TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~251~~ 33

HENRIETTA DAVIDSON, TESTAMENTARY EXECUTRIX OF JOHN DAVIDSON, DECEASED, PLAINTIFF IN ERROR,

vs.

THE BOARD OF ADMINISTRATORS OF THE CITY OF NEW ORLEANS AND THE CITY OF NEW ORLEANS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

FILED DECEMBER 8, 1874.

SUPREME COURT OF THE UNITED STATES.

No. 251.

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vs.

THE BOARD OF ADMINISTRATORS OF THE CITY OF NEW ORLEANS AND THE CITY OF NEW ORLEANS.

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1 Supreme court of La.

IN THE MATTER OF THE COMMISSIONERS OF THE First Draining District, praying for the homologation of the assessment-roll, etc., etc. } 4338.

Filed Oct 31st, 1872.
(Signed) M. P. JULIAN,
Dy. Clerk.

2 IN THE MATTER OF THE COMMISSIONERS of *of* the 1st Drainage District, praying for the homologation of the assessment roll, &c. } No. 4338.

Supreme court of Louisiana.

To the honorable Joseph P. Bradley, associate justice of the Supreme Court of the United States:

The petition of Mrs. Henrietta Davidson, testamentary executrix of the estate of John Davidson, deceased, opponent and defendant in a cause wherein the Board of Administrators of the City of New Orleans, and the City of New Orleans as collectors of the assessments in the first draining district, appear as plaintiffs in a proceeding to homologate the tableau of assessments against the property of parties owning lands in said district for drainage purposes, and the succession of John Davidson, represented by Mrs. Henrietta Davidson as testamentary executrix, is defendant & opponent, respectfully represents that peti-
3 tioner is aggrieved by a final judgment in the supreme court of the State of Louisiana, bearing date the 9th day of February, 1874, and that petitioner herewith exhibits to your honor a copy of the record in the cause, with the opinion & decrees therein, annexed to this petition as Exhibit A; that it appears on the face of said record that your petitioner as testamentary executrix of the will of John Davidson, deceased, claimed a right, title, and privilege under the Constitution of the United States, and especially under article 4, section 4, of the said Constitution, & article 5 of the amendments thereto, to be protected from having private property of said succession taken for public use without just compensation and without due process of law; and further claimed that the effect of said acts was to take from the people the right to manage their local affairs through representatives in their municipal governments, a right inherent in the people of every State of the Union, antedating the constitutions of those States, and not only reserved by implication therein, but protected and secured under the Federal
4 Constitution; but that against common right and the right of the defendant, the legislature of Louisiana has passed certain acts for the purpose of effecting the drainage of a certain district of country lying around the city of New Orleans, within the limits of the parishes of Jefferson & Orleans, the effect of which acts, as interpreted by this decision of the supreme court of Louisiana, of which complaint is now made, will be to take from your petitioner property, divest the said succession of vested rights without just compensation, as it appears from the statement of facts in the transcript annexed hereto that the work could be done for much less than the amount arbitrarily fixed by the act of the legislature, and that the cost of the improvement would be much greater than the value of the property, & that the money is all to

be paid in advance of the work's being done; and, furthermore, that property has already been sold in this same district, under judicial process, & bought in by the draining board for the amount necessary to pay the assessment & costs.

5 Your petitioner avers that she is called upon the large sum of fifty thousand dollars immediately under these circumstances. Petitioner avers that she has set up these constitutional rights, titles, and privileges on the trials in the State courts, but that the said court over'uled and determined adversely to the same, thereby establishing and maintaining a most oppressive doctrine, and one that violates the vested rights of your petitioner secured by article 5 of the amendments to the Constitution of the United States; and, in regard to a portion of this property, causing it not only to pay for its own drainage the full amount, but to pay a second time for the drainage of other property, and that in violation of an express contract between the State and the owners of the property, embodied in the laws under which the first drainage was done.

Wherefore petitioner prays of your honor to allow a writ of error to the Supreme Court of the United States, to sign a citation to the plaintiffs in the cause, and to approve the bond herewith submitted, and for such other orders as to justice and right may in the premises appertain.

J. M. CARLISLE,
H. N. OGDEN,
Of Counsel for Petr.

6 CITY OF WASHINGTON, *February 17th*, 1874.

The prayer for the allowance of a writ of error, contained in the foregoing petition, is hereby allowed, and the amount of the bond is fixed at ten thousand dollars.

JOSEPH P. BRADLEY,
Associate Justice of Supreme Court U. States.

(Indorsed:) 4338. Sup. court. Filed Febr'y 25th, 1874. M. P. Julian, dy. clk. sup. court State of La.

7 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Louisiana, and holding sessions in New Orleans, *of* Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of the State in which a decision can be had in the matter of "The Commissioners of the 1st Draining District, praying for the homologation of the assessment-roll, etc., etc.," being No. 4338 of your docket, wherein a title, right, privilege, and immunity is claimed under the Constitution of the United States, and the decision is against said title, right, privilege, & immunity specially set up therein by Mrs. Henrietta Davidson, as testamentary executrix of John Davidson, deceased, a manifest error hath happened, to the great damage of the succession of John Davidson, represented by his testamentary executrix, Henrietta Davidson, one of the opponents and defendants therein, as by said opponent's complaint appears:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under

your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Nathan Clifford, associate justice of the said Supreme Court of the United States, this 16th day of February, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.]

F. A. WOOLFLEY,
Clerk of the United States Circuit Court
for the District of Louisiana.

(Indorsed:) 4338. United States circuit court, No. . versus . Writ of error. Filed Febr'y 18th, 1874. M. P. Julian, dy. clk.

8 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges
[SEAL.] of the supreme court of the State of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the Board of Administrators of the City of New Orleans and the City of New Orleans, plaintiffs, and Henrietta Davidson, testamentary executrix of the estate of John Davidson, deceased, defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and
9 the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said defendant, as by her complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable Nathan Clifford, senior associate justice of the

said Supreme Court, the nineteenth day of February, in the year of our Lord one thousand eight hundred and seventy-four.

Issued 19th Feb., 1874.

(Signed) D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

(Signed) JOSEPH P. BRADLEY,
Associate Justice Sup. Ct. U. S.

(Indorsed:) Writ of error. Filed Feb'ry 25th, 1874. M. P. Julian, dy. clk.

10 The United States of America to the Board of Administrators of the City of New Orleans and the City of New Orleans, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, wherein Henrietta Davidson, testamentary executrix of the estate of John Davidson, deceased, is plaintiff in error and you are defendants in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Joseph P. Bradley, associate justice of the Supreme Court of the United States, this nineteenth day of February, in the year of our Lord one thousand eight hundred and seventy-four.

(Signed) JOSEPH P. BRADLEY,
Asso. Justice.

11 On this 27th day of February, in the year of our Lord one thousand eight hundred and seventy-four, personally appeared Octavus N. Ogden, before me, the subscriber, M. M. Cohen, United States commissioner for the 5th circuit & district of Louisiana, and makes oath that he delivered a true copy of the within citation to L. A. Wiltz, mayor of the city of New Orleans, in person, at the city hall in said city, on this 27th day of February, A. D. 1874.

Sworn to and subscribed the 27th day of February, A. D. 1874.

[SEAL.] M. M. COHEN,
United States Commissioner for the Fifth Circuit and District of Louisiana.

12 The United States of America to the Board of Administrators of the City of New Orleans and the City of New Orleans, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Louisiana, wherein Henrietta Davidson, testamentary executrix of the estate of John Davidson, deceased, is plaintiff in error, and you are defendants in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Joseph P. Bradley, associate justice of the

Supreme Court of the United States, this nineteenth day of February, in the year of our Lord one thousand eight hundred and seventy-four.

JOSEPH P. BRADLEY,
Asso. Justice.

13 On this 27th day of February, in the year of our Lord one thousand eight hundred and seventy-four, personally appeared Octavus N. Ogden before me, the subscriber, M. M. Cohen, United States commissioner for the 5th circuit & district of Louisiana, and makes oath that he delivered a true copy of the within citation to L. A. Wiltz, mayor of the city of New Orleans, in person, at the city hall in said city, on this 27th day of February, A. D. 1874.

Sworn to and subscribed the 27th day of February, A. D. 1874.

[SEAL.] M. M. COHEN,
United States Commissioner for the 5th Circuit & District of Louisiana.

14 State of Louisiana, seventh district court for the parish of Orleans.

IN THE MATTER OF THE COMMISSIONERS OF the First Draining District, praying, etc. } No. 9189.

Motion and order to file record.—Filed December 5th, 1871.

On motion of Rufus Waples, attorney for the city of New Orleans, and of the administrators thereof as collectors of the assessments in the first draining district, and on suggesting that he herewith present the record numbered 16269, of the late third district court of New Orleans, and on further suggesting that it contains the proceedings on which the judgment decreeing mortgage and privelege on the property to be drained in said district, and therefore properly found the basis of the proceedings heretofore had in the above-entitled case, it is or-
15 dered that the record herewith presented, transferred from the third district court, be filed in this court in the case No. 9189.

16 State of Louisiana, seventh district court for the parish of Orleans.

IN THE MATTER OF THE COMMISSIONERS OF the First Draining District, praying for a decree, etc. } No. 9189.

Petition of the City and Administrators of New Orleans for the homologation of assessment-roll for said district for the annual installments from the second to the tenth, inclusive.—(Filed December 7th, 1871.)

To the Hon. T. W. Collens, judge:

The petition of the City of New Orleans and the Administrators thereof, composed of Benjamin F. Flanders, president, and John S. Walton, Alfred Shaw, Louis T. Delassize, Herbert Bonzano, James Lewis, John Cockreur, and F. C. Remick, residing in said city and parish, all
17 said petitioners appearing as the representatives of the persons assessed for the payment of the expenses of leveeing and draining of the first draining district, and representing also the interests of the

State of Louisiana and of the said city, and herein proceeding for the use of the persons and corporations represented as aforesaid, respectfully represents:

That in conformity with the act of the general assembly of this State entitled "An act to provide for the collection of the assessments for drainage, under the acts of March 18th, 1858, and the act supplementary thereto of 17th March, 1859," a tableau or assessment-roll of the amount to be paid for draining the property within the first drainage district within the parish of Orleans, from the second to the tenth annual installment inclusive, has been prepared, and notice thereof duly given.

That your petitioners herewith present a copy of said assessment-roll, to be filed herewith in this court.

That in said assessment-roll the property assessed is set forth
18 and described, together with the amount assessed and the names of the owners thereof, as far as known; and in case the owner or owners are unknown, said fact is stated.

All of which, together with other necessary particulars, will more fully appear by reference to said copy, herewith exhibited and filed and contained in a folio volume marked "B," consisting of three subdivisions, the first entitled Book No. 1, "B," the second book, No. 2, "B," the third Book No. 3, "B," together with a recapitulation.

That said assessments have been open for the inspection of the persons whose property was assessed for many months, and said persons were notified duly by public advertisement, but they have neglected to pay the amount due by them respectively to the common fund of all, as set forth in said assessment-roll.

That your peti'oners herein appearing in the capacity aforesaid have been by act of the general assembly of the State entitled "An act
19 to provide for the drainage of New Orleans," number 30 of the acts of the session of 1871, "subrogated to all the rights, powers, and facilities possessed and enjoyed by the commissioners of the several draining districts, or of other corporation charged with the duty of draining and leveeing within the limits of the city of New Orleans and Carrollton," and authorized and directed to collect the balance due on the assessments as shown by the books of the first, second, and third draining districts under the acts of March 18th, 1858, and March 17th, 1859, and the several supplementary and amendatory acts thereto; and directed to execute and enforce the said assessments according to existing laws, which said assessments are, by said act of 1871, declared to be confirmed and made exigible.

Your petitioners therefore pray that it may please the court to order that all persons whom it may concern do show cause within thirty days from the first publication of said order, if any they have, why said assessment roll should not be approved and homologated; that said
20 order be published in the English and French languages in the official journal twice each week for thirty days; and after due proceedings had, judgment be rendered approving and homologating said assessment-roll; to operate as a judgment against the property assessed and the owners thereof respectively, that is to say, a judgment against each property described in said assessment-roll for the amount assessed against it and remaining unpaid, and against the owner or owners of each property set forth in said roll for the amount assessed against his or their property respectively, for the purpose of defraying the expenses of the draining and leveeing the said first district as contemplated by law and by the acts of the legislature aforesaid, with ten per centum in addition to the amount assessed, to pay costs and counsel

fees, and six per centum per annum interest on each amount assessed, from the date of the assessment, in accordance with law.

And your petitioners pray for all general and equitable relief.

And as in duty bound, etc., etc.

(Signed) RUFUS WAPLES,
Atty. for Petitioners.

21 *Order.*

Upon the filing of the assessment-roll showing the amounts due by the persons and property assessed in the first draining district within the parish of Orleans, from the second to the tenth annual installment inclusive, the city and administrators of New Orleans charged with the collection of said amount and the management of the affairs of said district, it is ordered that all persons whom it may concern do show cause, if any they have, within thirty days from the first publication of this order, why said assessment-roll should not be approved and homologated; and it is further ordered that said order be published in the English and French languages in the official journal, the New Orleans Republican newspaper, twice each week for thirty days.

New Orleans, December 7th, 1871.

(Signed) T. WHARTON COLLENS, *Judge.*

22 State of Louisiana, seventh district court for the parish of Orleans.

IN THE MATTER OF THE COMMISSIONERS OF THE First Draining District, praying for a decree, etc. } No. 9189.

Petition of the City and Administrators of New Orleans praying for the homologation of the assessment-roll for said district.

Notice published in New Orleans Republican newspaper, of the following dates: Dec'r 10th, 14th, 20th, 23rd, 27th, and 29th, 1871, and January 2nd, 5th, 8th, 10th, 11th, 1872, to show cause why assessment-roll herein should not be approved and homologated.

Order.

Upon the filing of the assessment-roll showing the amounts due by the persons and property assessed in the first draining district within the parish of Orleans, from the first installment inclusive, and
23 upon the petition of the City and Administrators of New Orleans, charged with the collection of said amounts and the management of the affairs of said district,

It is ordered that all persons whom it may concern do show cause, if any they have, within thirty days from the first publication of this order, why said assessment-roll should not be approved and homologated; and

It is further ordered that said order be published in the English and French languages, in the official journal, the New Orleans Republican newspaper, twice each week for thirty days.

New Orleans, December 7th, 1871.

(Signed) T. WHARTON COLLENS, *Judge.*

A true copy.

(Signed)

A. D. BERMONDY, *Clerk.*

State of Louisiana, seventh district court for the parish of Orleans.

IN THE MATTER OF THE COMMISSIONERS OF THE First Draining District, pray', etc. } No. 9189.

Exceptions and opposition of Mrs. Henrietta Davidson.

And now, for the purposes of this exception, comes into court Mrs. Henrietta Davidson, widow, and testamentary executrix of John Davidson, deceased, and avers that the succession of the said John Davidson is now open and under administration in the hon'ble the 2nd district court of this parish.

Your appearer therefore, as in duty bound, excepts to the jurisdiction of this honorable court, and prays that the application of plaintiffs be dismissed so far as this succession is concerned.

An' in the event of said exception being overruled, and then reserving all the benefits of said exception on appeal, your appearer as executrix aforesaid respectfully opposes the approval and homologation of the assessment-rolls filed herein, upon the following grounds:

1st. The various acts passed by the legislation having reference to this subject, and upon which this claim is predicated, are all unconstitutional, null, and void:

(1°.) Because they provide for a tax which is not equal and uniform throughout the State, and delegate a sovereign power.

(2°.) Because they violate the constitution of this State, in that their direct effect is to take from the people a power which from time immemorial has been excercised through their local municipal governments, and confer it upon the legislature.

That the right to manage their local affairs and administer their property through representatives in their municipal governments is inherent in the people of every State in this Union, antedating their constitutions, and reserved by implication in those instruments.

It also, therefore, violates article 4th, section 4th, Constitution of the United States.

2nd. If said acts be regarded as an exercise of the right of eminent domain, they are still unconstitutional because they violate act. 110 of the constitution of this State, article 105 of the constitution of 1852, and article 5, amendments of 1791, Constitution of the United States, in that they deprive of property without due process of law, and in that they divest vested rights, and that for no purpose of public utility and without adequate compensation made in the manner pointed out in those constitutions.

The claim of plaintiffs is based ultimately upon the statutes of 1858, 1859, and 1861, passed under the State constitution of 1852, under which a divestation of vested rights could only take place for adequate compensation previously made.

That the claim to this assessment is made in advance of a performance of the work, and before there can be even a pretence that a benefit has been already conferred upon the property or person assessed.

3rd. Whether said assessment be the exercise of the right of eminent domain, or merely that of police power, the legislature can have no right more than the lowest sum for which the benefit could be conferred on the property; consequently not more than the sum for which

individuals, the city, or the State could have obtained the accomplishment of the said benefit.

The assessment herein claimed is to be paid out at the rate of 50 cts. per cubic yard for excavation, and 50 cts. per cubic yard for levees, or to meet the payment of certificates, one of which is hereto annexed, marked "B," and made part hereof; and the truth is that the Board of Administrators could have obtained the performance of this work at much less cost.

4th. Because the effect of the homologation herein sought is to appropriate the property of individuals on the one hand, and illegally confer it on corporations on the other.

28 This oppression and confiscation, as will be shown on trial hereof, has been excercises heretofore, and is herein again attempted under color of law.

5th. Because the homologation is to operate as a judgment "against the property assessed, and the owners thereof, on which execution may issue as on judgment rendered in the ordinary mode of proceedings."

Many superficial feet are not worth the amount of the assessment; any such judgment, therefore, violates articles 5th, 13th, and 14th of the amendments of the Constitution of the United States, and articles 2nd, 3rd, and 110th of the constitution of the State, as it creates a personal servitude, exacting the fruits of personal labor, as it takes private property for public utility, without just compensation, without due process of law, and abridges the privileges and immunities of citizens.

6th. Because under the drainage acts this proceeding is irregular and unwarranted, even if such acts were constitutional, which is denied.

No assessment-roll can be filed until a demand is made for an installment, which shall not exceed ($\frac{1}{10}$) one-tenth of the entire

29 assessment, and not more than one installment can be called for during one year.

The judgment herein sought is for over $450,000, while the acts do not allow a larger assessment than to realize the sum of $350,000.

The amounts already realized in the first drain'g district, including property certificated, reach $300,000, leaving a balance of not more than $50,000 to be claimed in said district in any view of case.

7th. The act of 1859 distinctly recognizes the constitutional objection to the levy of this assessment in advance of the drainage of the district, and undertakes to provide a means of escape from the difficulty.

The money necessary for drainage purposes, under the provisions of that act, was to be raised by issuing bonds, were, in the contemplation of the act, only to be redeemed as the work progressed.

These bonds have never been issued, but an assessment is now sought to be enforced to meet both their principal and interest, and that without the benefit which it was contemplated would accrue from the use of the money which said bonds were to realize.

30 8th, and lastly. Your appearer adopts all the oppositions made by W. O. Denégre and Patrick Irwin, so far as applicable to this case and not inconsistent with anything heretofore alleged, and pleads the prescription of ten years.

Wherefore your appearer prays that the demand of the Board of Administrators, etc., to have this assessment-roll homologated, be disallowed and rejected, so far as it affects the succession of John Davidson, or the property standing in his name, and shown by the

annexed list marke' "A," and made a part of this opposition ; and appearer prays for all general and equitable relief.

And will ever pray, etc.

(Signed) H. N. OGDEN,
Atty. for Executrix.

31 *Certificate B annexed to exceptions of Mrs. Henrietta Davidson.—(Filed Feby. 10th, 1872.)*

No. . DEPARTMENT OF PUBLIC ACCOUNTS,
$, B. *New Orleans,* , 187 .

Administrator of finance, city of New Orleans, pay to the order of The Mississippi and Mexican Gulf Ship-Canal Company $\frac{1}{100}$ dollars, out of any funds in the city treasury to the credit of said company.

This warrant, in case of the non-realization or non-collection of assets provided for under act No. 30, legislature of Louisiana, session of 1871, to bear eight per cent. per annum interest, and it is given and received with the understanding that it shall not be enforceable by suit and judgment, but if not paid within one year, out of the proceeds of the drainage tax and assets, it shall be fundable in bonds of the city bearing eight per cent. per annum interest, payable semi-annually, having ten years to run, and with due provision for retiring the same, and securing the punctual payment of interest and gradual extinction of the principal.

32 The city shall have power to sell said bonds or give the same in payment of the work performed ; but no sale or exchange shall be made at a price less than eighty cents on the dollar, exclusive of interest; and any holder of a fundable warrant, after thirty days' notice, if not paid in money, may demand bonds for the same at eighty cents on the dollar charge.

Act No. 30, legislation of Louisiana, session 1871.

Administrator of Public Accounts.

List of property, marked "A," annexed to exceptions.

1st district, square 16, Fulton, Peters, Poydras, and Lafayette.
" " square 18, Fulton, Peters, Girod, and Notre Dame.
" square 218, St. Charles, Carondelet, Julia, & Girod.
" square 220, St. Charles, Carondelet, Poydras, & Lafayette.
" square 629, Palmyra, Banks, Dupre, Gayoso.

33 1st district, square 655, Palmyra, Banks, Salcedo, Lopez.
" square 656, Palmyra, Gasquet, Salceda, Lopez.
" square 729, Palmyra, Banks, Telemaque, Cortes.
2nd " Allan place, Metairie road, Bayou St. John, and New Canal property.
" " square 459, Toulous, St. Peters, Hagan avenue, & Bayou St. John.
1st district, square 328, Franklin, Liberty, Julia, Girod.

34 State of Louisiana, seventh district court for the parish of Orleans.

IN THE MATTER OF THE COMMISSIONERS OF the First Draining District, pray', etc. } No. 9189.

Motion and order for subpœna on mayor.—(Filed 24th Feb'y, 1872.)

On motion of Mr. Ogden, counsel for the executrix of John Davidson,

opponent herein, it is ordered that W. T. Mayo be summoned to appear in this court on Monday, 26th Feb'y, 1872, and that he be ordered to produce at that time in court, and for the use of said opponent, all the book of the 1st draining district which go to show the amount that has already been collected.

35 Also the several sheriff's deeds made in accordance with adjudications of property sold for drainage taxes in that district, and also all titles to property turned over by the owners under any amicable arrangements for the settlement of these taxes.

Also all books going to show the amount paid to the Mississippi and Mexican Gulf Ship-Canal Company, or evidences of indebtedness issued to them.

36 State of Louisiana, seventh district court for the parish of Orleans.

IN THE MATTER OF THE COMMISSIONERS OF the first dra'ing district, pray', etc. } No. 9189.

Document produced by mayor of New Orleans in reply to a writ of subpœnas duces tecum.—Filed Feby. 26th, '72.

NEW ORLEANS, *April 4th*, '71.

To the mayor and city council of New Orleans:

GENTLEMEN: Since last communication relative to the drainage of the city, we have organized as a corporation for the dredging of canals and the building of levees for that purpose.

We now desire to inform you that we are prepared to bid for
37 the drainage-work, and now do so at twenty per cent. less than the price stipulated in act No. 30, session of 1871.

We are ready to commence work immediately, and at any time, on a three months' notice, will increase of workings to any limit the city may desire.

(Signed) N. E. BAILEY,
President pro tem. New Orleans Dredging Co.

OFFICE NEW ORLEANS DREDGING COMPANY,
No. 110 *Carondelet Street, April* 13*th*, 1871.

To the honorable mayor and board of administrators of the city of New Orleans:

GENTLEMEN: By a resolution of the directors of this company, I am ordered to inform you that it is read' and now offers to commence the work of excavating, etc., immediately, as may be directed by the board of administrators, and will take, at par, the bonds as proposed to be issued by the city for the work at the price named in our proposal.

(Signed) G. W. SHEPPARD,
Secretary pro tem. New Orleans Dredging Co.

38 State of Louisiana, seventh district court for the parish of Orleans.

IN THE MATTER OF THE COMMISSIONERS OF the first draining district, praying, etc. } No. 9189.

Document annexed to note of evidence.—Filed Febr'y 26th, 1872.

Judgment rendered by the late 3rd district court on the 24th of August, 1861.

Proof having been made of the publications required by law and of the deposit of the plan in the office of the recorder of mortgages of the

parish of Orleans by the commissioners of the first draining district, agreeably to the provisions of law, it is hereby ordered, adjudged, and decreed that each portion of the property situated within the par-
39 ish of Orleans, comprised within the first draining district, viz, beginning at the Mississippi River, at Julia street, following said street to the canal of the Canal and Banking Company, following said canal as far as Lake Pontchartrain, along said lake to Bayou St. John, Canal Carondelet, along said canal to St. Peter's street to the river Mississippi, and following the bank of the said river to the starting-point, be, and the same is hereby, subjected to a first-mortgage lien and privilege in favor of said board of commissioners of the first draining district for such amount as may be assessed on it, for its proportion of the whole cost of the drainage of said sections, together with interest thereon at the rate of six per centum per annum from demand until first payment.

Judgment rendered and signed August 24th, 1861.

(Signed) R. K. HOWELL,

Judge 6th District, Acting in the Absence of Judge Foute.

40 State of Louisiana, seventh district court for the parish of Orleans.

IN THE MATTER OF THE BOARD OF COMMISsioners of the first draining district, (city of New Orleans,) subrogated, praying, etc. } No. 9189.

Opinion of court, rendered 15th April, '72.

The city of New Orleans, in pursuance of certain acts of the
41 legislature, has filed a petition and assessment-rolls, for the purpose of compelling the proprietors of grounds in the first draining district to pay in advance the estimated probable cost of draining that district, which is bounded by St. Peter street, Carondelet Canal, and Bayou St. John below, and Julia street and the New Canal above, from the Mississippi River to Lake Pontchartrain.

The works of excavating the drains, building the levees, etc., have been commenced, are in progress, but are far from completion.

The proprietors resist this assessment on various grounds, which I will examine in the order of their importance.

A formal preliminary statement of those grounds is, I think, unnecessary.

If it were true that the assessment in question is necessarily either a tax or a mode of expropriation, and that there is no category of burdens on property except these two known to the constitution
42 and laws, then it would certainly be unconstitutional.

As a tax it would be in violation of article 118, since it is levied only on a particular portion of the land within the corporate limits, instead of being and uniform throughout the city, and since it is imposed according to the measure of the land sewed by the drains instead of being assessed "in proportion to their value."

As a mode of expropriation, it violate' article 110, since the city under the act assumes control of property belonging to private persons, changes its interior and natural condition, contrary to the will of the owner, and thus diminishes owner's jus in re., without awarding him any compensation, but, on the contrary, makes him pay the expenses of this partial devestiture of his absolute ownership.

Taxation and expropriation, however, are not the only ways in which

the absolute ownership of property may be restricted, modified, or subjected to charges without any violation of the constitution.

43 The vested rights of the owner to use, dispose of, control, enjoy, and even abuse his property, and to prohibit any other person from entering its limits, is not so complete and absolute as the abstract definition of ownership would import.

All landed property in this State has from the very origin of all private titles to it been *been* burdened with certain servitudes, which arise—

1st. From the natural situation of the place.

2nd. From the obligations imposed by law.

3rd. Or from contracts between the respective owners. (C. C., 655.)

This limitation of the owner's jus in re. may be traced back as being the law existing before the sovereign vested any individual with any title whatever to any land in Louisiana.

Hence when the State uses the right thus reserved to her from time immemorial, and excercises it according to its true nature, there is no invation of invested private right, no taking of private property

44 which did no' belong anteriorly to the public for that purpose, but, on the contrary, there is only the enforcement of a condition upon which the private title itself was originally acquired.

Ownership consists not only in vested rights, but it imposes corresponding duties to the public and the neighbouring estates.

The owner has always been required to use his land so as not to cause any real damage to the neighbour. (C. C., 664, 665.)

Absolute ownership only gives the right to enjoy and dispose of one's property in the most unlimited manner, "provided it is not used in way prohibited by law or ordinances," (C. C., 476, 484;) "or the regulations of the police," (C. C., 497;) so that the right is theoretically unlimited, but practically limited.

Thus the law imposes obligations on the proprietor whose land is situated on the sea-shore or banks of rivers.

45 He must allow the free use of the banks to shipping and to fishermen. (C. C., 446.)

He cannot change the direction of a stream, or prevent the natural flow of waters from the land above, nor can he raise any dam to prevent this running of water, or make more onerous to the neighboring estate than it naturally is.

He cannot construct any "new work" from which injuiry to his neighbor or a public nuisance may be apprehended. (C. C., 852 et seq.; C. C., 656.)

Servitudes may be imposed by law for the public and common utility, (C. C., 660;) and this power, from the origin of the right of ownership under civil and constitutional sanction and protection, has always been the correlative of the right itself, and the legislature has exercised it in a variety of ways.

The law warned every man before he acquired land in this State that the construction of roads, levees, and other public or common works are among the objects of these servitudes, and that they should be

46 determined by general laws or municipal regulations. (C. C., 497, 661.)

Hence numerous laws and regulations have been made to compel proprietors to conform to certain restrictions and conditions in planting, (C. C., 687,) in building, (C. C., 664, 671, et seq.,) in digging ditches, drains, and wells, (C. C., 685, 788,) in erecting privies, chimneys, ovens, forges, furnaces, stables, factories, *factories*, (C. C., 683,) mines, (C. C., 497,) fences, (C. C., 682 et seq.,) etc., etc.

Turning to the public ordinances of the city of New Orleans, and of the towns and parishes, we find them prescribing particular rules in regard to all these matters and many more, such as cleanliness of yards, etc., filling of lots, preventing and suppressing the accumulation of stagnant waters, the obstruction of streets, sidewalks, and roads, and other nuisances.

The use and abuse of private property as well as of public things is prohibited in every respect in which the equal rights, convenience, and health of the neighbouring properties and residents may be affected.

47 The charter of the city of New Orleans and the ordinances passed in pursuance thereto present a good example of this class of rights and of legislation arising therefrom.

There is an element pervading it all which is very striking, and claims especial attention in this case. It is that the law imposes on the proprietors respectively the expense of carrying into effect and maintaining these servitudes.

They are required to pay the cost whether they do the necessary work themselves, or it is done on their default by the municipal servants and employees.

The reason is that the whole direct benefit accrues to the estates on and around which the work is done, the public obtaining only an indirect advantage which the public and distant proprietors in turn reciprocate by their own works.

This became the law of the land from the moment Iberville and Bienville in 1700 raised their flag and built a fort on the banks of the

48 Mississippi, taking formal possession of the territory in the name of the King of France; for the principle was in force and practically carried out by the laws of that country and of her colonies before Louisiana was discovered.

Hence every title to land in this State, from the first to the last, has been acquired subject to the condition of submitting to and performing the obligations resulting from these servitudes.

Hence, when they are practically enacted, there is no taxation or expropriation but only the fulfilment of a condition and duty implied by law in every right of ownership.

Thus the law has required the adjacent proprietor to furnish and keep up the public roads. (C. C., 701.)

There is a condition implied by law in the title of every owner that he shall furnish roads to the public, and a privilege attached to the land itself to secure the sums due to those who have worked by the job in making or repairing the levees, roads, bridges, and ditches

49 required by the police regulations. (C. C., 2009, 3216, S. 4.)

This obligation of the adjacent proprietors to furnish, make, and repair roads, levees, bridges, and ditches at their own expense is settled beyond controversy.

It is but recently that the legislature, on motives of policy or necessity, has relieved the owner of lands fronting on the Mississippi and other overflowing rivers from the charge of paying for building and repairing levees.

Now, if the could and can lawfully be made to pay for building and repairing levees, it can only be on the principle that they are and always have been bound to join their neighbours in redeeming the land from overflow.

It can only be on the principle that this obligation to redeem and protect the lands from overflow is a servitude arising from the peculiar

condition of the locality, and the correlative position of the proprietors as such, one to the other.

50 The articles of the civil code (650 and 657) relative to the servitude due by estate below to receive the waters which "run naturally from the estate above" were not applicable to the case of periodical overflows spreading themselves from a bordering river, lake, or sea; nor could they have a just and true application to the stagnant waters of a swamp or marsh, which becomes alternately wet and dry mainly from the action of the sun.

Hence, from the inadequacy of the code, special legislation, based on the general and recognized principle, became necessary to enforce the relative rights and obligations of contiguous estates subject to these overflows and alternations of dryness and stagnant water. This is the basis of our levee laws, the rightfulness and constitutionality of which are indubitable. The obligation of leveeing such lands and draining them are identical. The one obligation implies the other, the two cannot be seperated.

51 Building a levee diverts the land from the conditions and effects of its natural state.

It means that to render cultivation, etc., possible, the course of wild nature must be changed to prevent the sojourn of water, and, therefore, when the levee itself would prevent the natural drainage, *or* system of artificial drainage must be created and legalized.

The proprietor must necessarily have the right to complete and secure the benefit for which the building of the levee is designed.

If this be unquestionable, as I think it is, with regard to lands in the interior subject to the alternate accumulation and exhaustion of stagnant waters, the legal principle of obligation is applicable in both instances; and that principle is that every estate is subject, and may be practically subjected, to such servitude as are necessary to enable the adjacent proprietors to reduce their estates to uses implied by the right of ownership in civilized society.

52 The contrary theory would enable a single owner to condemn not only his own land but that of his neighbor to eternal submersion and unproductiveness.

But how is this right to be enforced? Each of them is forbidden from erecting any works by which the enjoyment of the other is rendered more burdensome, (656, 778;) hence he cannot surround his own land so as to make his neighbor receive more than his share of *of* the stagnant waters or periodical overflow.

A work in common, a system of combined levees and drains is absolutely required, and here the municipal power must necessarily interfere, as it does, also, in the case of roads, sidewalks, paving of streets, etc.

When marshy and overflowed land is held by different persons, each of whom has title to a distinct part, and it is impracticable for a single one or several to protect it from overflow, or to have access by the road or street they have in common, unless the others join in construct-

53 ing and maintaining the necessary works, it follows from the nature of the case that they can be compelled to do so.

When each of them acquired title, he must have foreseen that a time would arrive at which it would become just and proper for him or the adjoining proprietor to reclaim the soil and reduce it to the uses of civilization.

He would not reasonably pretend that he had no such object, or, if he

had not, that it was not implied in the very act of receiving the marshy or swampy grounds from the Government or from any other source.

Without such an object his acquisition would be an absurdity, or even an act of malicious vanity conceived against the welfare of his neighbor and against local improvements and industry.

True each of the distinct proprietors has the right of letting his portion lay idle, but not in a condition which must prevent the others from using theirs according to its civil destination, which is that of being cultivated and inhabited by man.

54 The law which confers and protects ownership does not do so for the purpose of enabling the owner to keep his land in a wild state, but contemplates that the owner shall in due time make it fit for man instead of wild beasts and pernicious reptiles. If he will not or cannot do this for himself, his refusal or inability is legal only so far as it does not prevent it to be done by the adjoining owners. Thus far the law allows him to have his own way, but not to the extent of thwarting the just rights of his neighbors, who call upon him to do his part of what they all tacitly engaged to do by the very nature and origin of their title.

Indeed, wherever the law cannot trace the origin of ownership to a gift or sale from the State under pre-existing law, it traces it to the fact of pre-emption by actual settlement and cultivation.

Thus this pre-emption, acquired by converting the land from its natural state to a use and improvement suited to the wants of man

55 as a tiller of the soil and builder of habitations, is even the foundation of the right of ownership itself. It is regarded by all writers on elementary jurisprudence.

These implied obligations, as well as those expressly declared by law, are particularly apparent in this case.

The whole of the first draining district is laid off in city squares and lots, and is intersected by *by* streets, at right angles, running perpendicularly from the river to the lake, or parrellel thereto from boundary to boundary. The titles are according to the of this distribution, divided into squares and streets.

What does this mean? Simply that the present owners have acquired with the common intent and mutual understanding that they would do whatever the then existing laws and the general principles of jurisprudence required them to do, as owners of such property.

The vacant land was indicated as the seat of a city. It is on

56 the verge of a city already built, and seeking to extend itself along the streets of the vacant site.

It must have been manifest to those who acquired squares in this vacant site that these streets must be made fit for travel, have sidewalks made on each side of them, be ditched, graded, and paved. They were bound to know that these works were to be done at their expense.

That this was and still is the law of the State and city in regard to lots, squares, and streets thus situated.

Assuredly they cannot with justice claim that their lands, which are now useless and have a mere nominal value, or exposed to the inconvenience of overflow, should be drained or protected from overflow, and that then they should privately derive all the direct advantage and the enhanced value at the public expense. Nor could each *each* owner

57 bide his own time for doing this work. *Nor could each owner bide his own time for doing this work.* This discretion of fixing the time when it should be done rested with the municipal authorities acting under and agre'ably to acts of the State legislature.

Drainage was a necessary prerequisite to all this, and was indeed an essential part of it under the same laws and conditions.

Nevertheless the right of the State or city authorities to have this drainage done at the expense of the owners of the land is not wholly arbitrary. They cannot arbitrarily determine what the cost shall be, and determine the rate of assessment, as when they levy a tax. The amount of taxation depends entirely upon the will of the sovereign; but this is not a tax. It rests upon another foundation. It is an understanding of the State to do a work for the benefit of individuals who have failed from inability or from the difficulty of acting in concert.

58 Hence from the necessity of the case the State or city becomes the negoti'um gester, or special agent of the parties.

It is only on this principal that the State or city can interfere with this private property and make an assessment.

It is only by claiming to have acted as the necessary agent of the parties assessed, and for a special purpose distinct from the general obligation of contributing to the common treasury, that the municipal corporation steers clear of the Scylla and Charybdis of the article in the constitution relative to taxation and expropriation.

If this assessment were really one or the other of these, boldly admitted or even disguised, it would be the duty of the judge to deny it entirely and dismiss the proceedings.

I can take the case, then, as a demand for the re-imbursement of an actual expenses, justly and prudently incurred, by a necessary agent for the benefit of his principal. (C. C., 2278, etc.)

59 In many decisions of the Supreme Court similar demands of municipal corporations for paving of streets, laying of sidewalks, etc., have been allowed, and the re-imbursement due ascertained, according to this view of the nature of the case. (H. D., p. 977, Nos. 1 & 2; p. 978, Nos. 9, 10, 11, p. 1550; Nos. 15, 17, 18, 19, 20, 21, et seq., 5 N. S., 409.)

These premises being settled, it follows—

1st. That from the ground and nature of the cause and right of action, it being for the "re-imbursement" of an expense prudently and necessarily incurred, neither the State nor city can compel the payment of an arbitrary sum fixed by themselves, and really exceeding the price at which the work could have been properly effected.

2nd. That for the same reason payment cannot be demanded in advance, since the action itself is founded on the fact of an actual expense, a work really done, a benefit positively conferred, a re-imburse-

60 ment, not a tax depending upon the mere discretion of the sovereign.

The cause of action is the fulfilment of a condition-precedent—the happening of an event without which no action could exist. There can be no re-imbursement until there has been a disbursement.

There can be no demand of judgment until there is a debt; no debt till there has been a service or benefit realized.

These prerequisites are expressly contemplated by the code; and in fact cannot be constitutionally dispensed with, for without them the State would be exacting money or property for nothing—levying a purely arbitrary contribution.

That when the draining of a section has been completed, and an assessment thereon for the work has been made and paid, the squares and lots thereof cannot be included in a new and undrained section; or,

at any rate, cannot be made to pay for the draining of all or part of another section.

This follows from the premises that the only ground on which
61 the assessment can be constitutionally rested is a direct indebtedness of the land charged for a necessary improvement, which the owner was bound to make at his own expense, or in common with others similarly situated, and liable with him to do the same thing.

It was evident that to comprise property which has already paid for its own complete drainage in an undrained section would be to make it pay a part of the debt really and only due by the undrained section, and thus to pay for a benefit not to itself but to others; or, in effect, to pay twice for only one draining or work.

The assessment now demanded infringes all three of these condition'.

In regard to first *first*, it proposed to enforce payment for the work at the rate of fifty cents per cubic yard of excavation, and fifty cents per cubic yard of protection-levee, because the city had chosen to waive all constitutional objections and has submitted to the act of the
62 legislature commanding a contract at that price with a person legislatively designated.

Whether the city could validly waive her constitutional rights need not be discussed, for it suffices that she could not dispose of the rights and defences of the proprietors.

Now these proprietors allege and have proved that the just and true cost of such work, left open to competition, (as it has always been in regard to sidewalks, paving, levees, etc., in accordance with the fundamental rules governing such cases,) is twenty per cent. below the sum the act required.

The defendants cannot be made to pay this excessive and arbitrary charge of fifty cents per yard when it so clearly appears that forty cents is entirely sufficient to pay for it.

These remarks are also applicable to the arbitrary fixing of the rate of two mills per superficial foot of ground, which, according to the very terms of the act of 1872, would probably leave a surplus, which the law attempts to appropriate to fill the common treasury of the city, as if it were the proceeds of a tax.

63 In regard to the second condition, the assessment presented is for the estimated cost of the whole work, though only a small portion of it is done.

I have already shown that there can be no legal basis for exacting a payment in advance—re-imburs'ment before a disburs'ment—in this class of cases. Nor do I think it the true intent and meaning of the acts of 1858, 1859, and 1871 to authorize such a demand.

Section 7 of the act of 1858 authorizes the filing of the preliminary plans and an estimate of probable cost, and the recording of it to operate as a lien only "whenever the board of commissioners is prepared to drain their respective section or district." Then, by the eighth section, they are authorized to make assessments to defray the construction, which shall be collected from time to time as the wants of the board (for the work) may require."

It is evident that the legislature contemplated that the board should not oppress the owners with liens and assessments till the work
64 was going on, and that payment should be demanded only in proportion to its progress.

This becomes still more apparent by the act of 1859, which enables a c h of the boards to borrow $350,000 for ten years to enable them "to

carry into effect and to commence immediately" the work contemplated by the act of 1859.

This act then authorizes yearly assessments to "pay the annual interest on said bonds and the bonds" themselves as they mature.

Thus it is clear *it is clear* that if the work had been immediately commenced and actively prosecuted by means of funds resulting from the sale of the bonds would have been drained as foreseen (by sec. 8 of 1858) in less than two years, so that so far from the law intending an assessment of the cost of the work in advance, its object was to make this payable in easy installments falling due long after the realization of the improvements and of their beneficial effect on the value of property.

Not only, then, is it clear that—

65 1st. The legislature could not exact payment in advance, but,

2nd. Did not intend to do so; and,

3rd. That the ten yearly assessments were authorized only in case the bonds were issued and the funds raised for the work.

Now, the evidence shows that the bonds were not issued, the funds were not raised, and the work was not carried on.

Nevertheless, the commissioners went on making the assessments exactly as if they had complied with all the conditions-precedent, and with the synallagmatic obligations assumed by them to carry on the work. They did commence years ago, but they soon stopped, and as a necessary consequence the assessments should have stopped also; but they kept on assessing, and now demand all the assessments in a lump, exactly as if the whole intent and requirements of the law had been complied with by them.

66 These ten-year assessments having no object but to pay the bonds, and having no sanction or validity because the bonds were not issued, it is only by the other disposition of the acts of 1858, 1859, and 1871 that assessments can be made; and these acts evidently propose that the payments shall be levied as the work progresses.

True, the act of 1871, p. 78, confirms the assessments under the acts of 1858 and 1359, and make' them exigible, but the boards are authorized "to execute and enforce the same as provided for by the several acts of the legislature."

Thus, if according to those very acts the assessments were illegal, there is no sanction or ratification, for this is made to depend upon their being in accordance with "the several acts of the legislature creating and regulating said boards."

67 It is not to be presumed that the legislature intended to sanction and ratify that which had been done contrary to its own laws and the constitution. It could only have been intended to execute and enforce valid and existing obligations.

But even if it did intend more, it could not create an obligation where there was none; it could not pass a retroactive law to bind persons who had been legally released before, and to make that obligation which had originally created no obligation whatever. (Cons. 110, C. C.; 8 H. D., 267; No. 2, 268; No. 4, 6, p. 269; No. 18, 20, p. 270; No. 3, et seq., p. 263; No. 1, et seq.) By the terms of the contract entered into between the city of New Orleans and the Mexican Gulf Canal Co., the cost of levees and excavations is made payable in monthly installments and in proportion to the actual work done; and the city has reserved the right of giving bonds or certificates payable in one year, instead of cash, so as to have time to collect from the proprietors of the section.

68 On no principle can the obligations be made more onerous to the proprietors than they are on their agent or negotiorum gestor.

In regard to the third point, the evidence shows that *that* the present assessment or district comprises a smaller section, which long before had been completely drained under the acts of 1835 and 1839, and that the proprietors of this smaller section have fully paid the cost of this complete drainage.

Not only does the act, by virtue of which they were made to pay, expressly exempt them from being assessed again, but for the reasons above stated they cannot be required to contribute to the draining of the adjoining portion of the marsh when those portions have not contributed to theirs. They cannot be made to pay first the whole cost of draining their own grounds and then a part of the cost of draining the grounds of others.

Hence this section (which is comprised between Claiborne street, Metairie Ridge, Carondelet Canal, and the New Canal) is only
69 chargeable with the cost of such work as it has been necessary to construct thereon for its own particular and distinct benefit.

Other objections to the assessments have been proposed. One is based on a late decision of the supreme court of Michigan, which denies to the State legislature the right of delegating to individuals, or private corporations, powers which properly belong to the people of the municipal district, counties, parishes, and cities, into which the State is constitutionally divided, or of passing laws which have the effect of creating a contract binding distinctly and only on one of these divisions, and not on the whole State.

While I concur with that decision, I do not find it applicable to this case for the simple reason that the objectionable feature referred to no longer exists in the act regulating this case.

All the powers of the board of commissioners have been restored to the city authorities, who have cured the legislative usurpation
70 by voluntarily making a contract with the private corporation named in the act of 1871, and it is now under the sanction of the administrators, elected by the people, that the work is now being done. It is also in the name of the city, and to obtain repayment of the expenses the city is incurring, that these proceedings are carried on.

Another ground of opposition is the plea of prescription of ten years against the judgment of 24th August, 1861, decreeing a preliminary privilege, etc. This plea would have been good if that judgment stood by itself, and had not been followed by other proceedings and a final judgment, confirming and defining it, rendered on 11th March, 1863, which is within the ten years.

Besides this the act of 24th February, 1871, (though it would not create a contract or have a restrictive effect to make individuals liable for debts not legally demandable of them before,) could and did stay or interrupt prescription.

71 Until prescription is finally acquired, and a debt thereby discharged, the legislature may abolish the prescription itself, or extend the term; and this they have certainly done in this case, by confirming the plans and assessments, and making the old assessments and judgments exigible at such time and in such manner as the board of (city) administrators may designate, etc.

Hence, so far as the judgments were valid and binding, at that date, 24th February, 1871, the term for enforcing them was indefinately extended, and the incomplete or incohate prescription entirely done away.

The assessments included in the judgment of 11 March, 1863, so far as they remain unpaid are repeated in the assessment-roll now presented; but no plea of res adjudicata has been interposed.

It is therefore ordered, adjudged, and decreed that the motion to homologate the tableau and assessment filed herein on the 7th December, 1871, be refused; that said tableau and assessment be va-
72 cated and rejected, and that the plaintiff have leave, and the right be reserved to said plaintiff, to present new tableau and assessments according to law, and to demand the re-imburs'ment of the actual and lawful cost of establishing the drainage of the first drainage district, from time to time, as the said work shall have actually progressed.

It is further ordered that the city of New Orleans be condemned to pay the cost of the proceedings to date.

73 State of Louisiana, seventh district court for the parish of Orleans.

IN THE MATTER OF THE COMMISSIONERS OF THE First Draining District, praying for a decree, etc. } No. 9189.

Judgment.—(Entered 15th April, 1872.)

For the reasons this day assigned in writing and filed herein, it is ordered and decreed that the motion to homologate the tableau and assessment filed herein on 7th December, 1871, be refused; that said tableau and assessment be vacated and rejected, and that plaint-
74 iff have leave, and the right be reserved to said plaintiff, to present a new tableau and assessment according to law, and to demand the re-imbursement of the actual and lawful costs of establishing the draining district from time to time, as *to* the work shall have actually progressed.

It is further ordered that the city of New Orleans be condemned to pay the costs of the proceedings to date.

Judgment signed April 19th, 1872.

(Signed) T. WHARTON COLLENS, *Judge.*

75 State of Louisiana, seventh district court for the parish of Orleans.

IN THE MATTER OF THE COMMISSIONERS OF the Board of the First Draining District, praying for a decree, &c. } No. 9189.

I hereby certify that I have been unable to complete the transcript of the record in the above-entitled and numbered cause in time for the return day to the supreme court, owing to its being a voluminous record, and the great labor on it render' a delay of some weeks absolutely necessary for the proper arrangement and copying of the same.

(Signed) A. D. BERNOUDY, *Clerk.*

CLERK'S OFFICE, *New Orleans, May* 20, 1872.

76 Supreme court of Louisiana.

IN THE MATTER OF THE BOARD OF COMMISsioners of the First Draining District, praying for a decree, etc., etc. }

On motion of Rufus Waples, attorney for the city of New Orleans, appellant from the judgment rendered in the above-entitled cause by the

seventh district of the parish of Orleans, on the petition of said city for the homologation of the assessment-roll for the draining of the first draining district, and on suggesting that the appeal was made returnable on the third Monday of May instant, and on further suggesting that he herewith present the certificate of the clerk of said court, duly executed, showing that he has been unable to complete the transcript of the record in time for said return day, and that owing to the voluminous character of said record it is necessary that the return day be extended to enable him to complete the transcript, it is ordered that the time for the return be extended to the first Monday of November next.

Filed May 21, 1872.

(Signed) J. McC. HYMAN,
Depy. Clerk.

77 State of Louisiana, seventh district court for the parish of Orleans.

IN THE MATTER OF THE COMMISSIONERS OF the First Draining District, praying, etc. } No. 9189.

Motion and order of appeal.—Filed 19 April, 1872.

On motion of Rufus Waples, attorney for the city of New Orleans, the petitioner for the homologation of the assessment-roll herein filed, and on suggesting that said petitioner feels aggrieved by the final judgment rendered herein on the 15th, and signed on the 19th instant, against the prayer of your petitioner, and that there is error in said judgment to the prejudice of said city, and those by it repre-
78 sented; and on further suggesting that said city is desirous of appealing from said judgment, and to suspend its operation pending said appeal, it is ordered that a suspensive appeal be granted to the city of New Orleans, returnable to the supreme court on the third Monday of May next, the time being insufficient to prepare the record for the first Monday of May, the city of New Orleans being exempt by law from giving bond and security upon appeal.

79 *Clerk's certificate.*

I, A. D. Bernoudy, clerk of the seventh district court for the parish of Orleans, do hereby certify that the foregoing 9,678 pages of record 9189 and 159 pages of record No. 17028, and books marked A, B, C, & D, and books B No. 1, B No. 2, B No. 3, and the assessment-roll, do contain a correct transcript of all the proceedings had, documents filed, and evidence adduced on the trial of the cause entitled—

In the matter of the Board of Commissioners of the First Draining District, praying for the homologation of the assessment-roll, etc.,

Instituted in the late third district court of New Orleans, No. 17028 of the docket of said court, and transferred to our said court on the second day of December, 1871, and now on record in my office under the No. 9189.

In testimony whereof I hereunto set my hand and affix the impress of the seal of said court, at the city of New Orleans, on this the tenth day of September, in the year of our Lord one thousand eight hundred and seventy-two, and in the ninety-seventh year of the Independence of the United States.

(Signed) A. D. BERNOUDY, *Clerk.*

80 IN THE MATTER OF THE COMMISSIONERS of the First Draining District, praying for homologation, &c. } 4338.

To the clerk of the supreme court:

DEAR SIR: As one of the attorneys of record in the above cause, which is entitled to be tried by preference in this court, I beg of you to place the same on the preference docket, and by so doing you will oblige

Yours, truly,
(Signed) W. O. DENEGRE.

Filed Feb'y 17, 1873.
(Signed) J. McC. HYMAN,
Depy. Clerk.

81 IN THE MATTER OF THE COMMISSIONERS of the First Draining District, praying for the homologation of the assessment-roll, etc., etc. } N. 4338. Appeal from the 7th district court, parish of Orleans.

As the constitutional question' raised in this proceeding have, in our opinion, been decided in the case of the draining company, 11 A, 370, we think it necessary to consider only the following grounds of opposition herein, as argued before us.

1st. That some of the lands upon which this assessment is levied were drained at their cost under the provisions of act No. 49 of 1839, and are, by the 13th section thereof, specially and forever exempted from any further assessment for draining.

2nd. That by act 165 of 1858, the assessments for draining any one section or district shall not exceed three hundred and fifty thousand dollars, which sum has already been nearly exhausted; and the present assessment is for $450,000 additional.

3rd. That the money cannot be collected in advance of the completion of the wo'k.

I. Section 13 of the act invoked reads: That whenever any sec-
82 tion of land shall have been drained and cleared by said draining company, it shall abandon the same to the municipal'ty or municipalities in which said section may be situated; and whereas the said draining will have been effected entirely at the expense of the proprietors of said land, and will greatly contribute to salubrity and drainage of the front part of said city, the said municipality or municipalities shall thereafter maintain the levees and ditches made by said draining company, and the machinery and other works erected by the same on the said section, in good repair and in efficient condition without ever laying an extra tax on the lands so drained. If any of the said sections should extend into two municipalities, the steam-engine and other machinery erected thereon by the said draining company shall be kept in repair and operation by the municipality within the limits of which it is established; but the other municipality shall contribute to the expenses thereby occasioned, in the same proportion which the extent of the portion of said section lying within the limits bears to the extent of the portion of the said section embraced within the boundaries
83 of the municipality wherein said engine or other machinery and building have been constructed; but each municipality shall

maintain the ditches and levees made by said company within its own limits.

It is contended by the opponents that this is a contract between them and the States, by which their lands, within a certain section drained by the said company, are exempted from the assessment now under consideration. We cannot concur in this view, and we think the litigation in the case cited in 11 A, clearly shows that the draining of opponents' lands by the then draining company was not done under a contract between the State and the opponents or their authors. We are unable moreover to find in the above section the elements of a contract. The State, in providing for the draining of said lands, was exercising one of the highest powers of its sovereignty, without requiring the consent of the owners, but rather enforcing it in despite of their opinions and objections, and directed that, when completed, the burden of maintaining and preserving the benefits thereof should be imposed
84 upon the municipal government and not upon the owners of the lands most directly benefited. This was but justice, but there was nothing like a mutual agreement that, if the owners would pay the company for draining their lands, the said lands should never again be required to contribute to any draining that might be or become necessary.

Those lands having thus been drained and made valuable were thereafter like the lands in the front and higher part of the city, and in common with them liable for maintaining the established drains and constructing any that might be elsewhere needed for the common benefit, and this is what is now being sought by these proceedings; all the lands within the first draining district, as it now exists, are uniformly assessed to effect the draining of all the low lands within its limits. It is not an extra tax within the contemplation of the said thirteenth section, which made it the duty of the municipality in its corporate capacity to maintain the levees and ditches made, and the machinery and other works erected by the draining company on the particular section, without ever laying an extra tax on the lands so drained,
85 were not to have an extra tax levied on them to maintain those works, etc.; were to be maintained out of the funds arising from the general tax imposed throughout the municipality; maintained at the public expense or the increased additional expense of the lands so drained. This, we think, is the fair legitimate construction and purpose of the section under consideration, and renders it unnecessary to decide whether the legislation sought by it, and had the power to limit or restrict the legislative action and authority of future legislation.

II. We do not consider the second objection well founded. That act of 1858 did limit the assessment in each of the three districts to three hundred and fifty thousand dollars; but the supplementary act No. 191, of 1859, authorized each of the three boards of commissioners to issue bonds to the amount of three hundred and fifty thousand dollars, and to levy an assessment to pay the interest and principal thereof, the amount of which assessment demandable yearly should not exceed in the aggregate more than one-tenth of such assessment. The act of 1861 (No. 57) provided, as its title indicates, for the collection of the
86 assessment for draining under the act of 1858, and the supplementary act of 1859; and it seems that the present proceedings were instituted in accordance with the provisions of this act of 1861. It is stated by a witness in this case, who was a member of one of the boards of commissioners created by the act of 1858, that the boards thought they could go to the extent of seven hundred thousand dollars

each. Whether they are correct or not in such opinion, the legislature o f1871, in act No. 30, has legalized the assessments made by the said three boards of commissioners under the acts of 1858 and 1859, and other supplementary and amendatory acts, and authorized and directed the board of administrators of New Orleans to collect the balance due on said assessments, which the said administrators are seeking to do in this case, and are asking for the homologation of the assessment-roll, showing the assessment due by the persons and property assessed in the first draining district within the parish of Orleans, from the second to the tenth annual instalment, inclusive.

III. The judge below sustained the third objection, and held that the assessment cannot be collected until the drainage is completed,
87 on the theory that the State, or city acting under authority from the State, is but the negotiorum gestor or special agent of the parties for whom the work is to be done, and is entitled only to re-imbursement for all disbursements actually made. In this there is error. As we have already remarked, the State, in ordering the draining, is exercising sovereign power, and can, of course, direct or authorize the work to be done in such way, and compensation made on such terms, as in its discretion may seem best, restrained only by the fundamental principles upon which the Government is to be conducted; and we find nothing in them inhibiting the State from having the means provided for such a work, in the way it is done in the present system of drainage in the city of New Orleans. On this question we see no room for judicial interference with the discretion of the State, and we think the existing laws clearly authorize the collection sought herein to be enforced. There are other grounds of opposition in the record, but they have not been urged before us, and we find nothing in them demanding at-
88 tention. The proceedings as to the property belonging to the succession of Jno. Davidson not being probate in its character and object, is not in conflict with the constitution giving exclusive probate jurisdiction to the 2d district court.

It is therefore ordered that the judgment appealed from be reversed, and that the oppositions herein be dismissed, at the costs of the opponents respectively; and it is further ordered that the assessment-roll herein, except that portion designated as "Book No. 2, B," on said roll, be, and is hereby, approved and homologated, and this approval and homologation shall operate as a judgment against the property described as assessed in said roll, and also against the owner or owners thereof, with ten per cent. in addition to the amount assessed, to pay costs and counsel fees.

IN THE MATTER OF THE COMMISSIONERS OF the First Draining District.

I dissent in this case, and reserve the right to file my reasons therefor.
(Signed) W. G. WYLY.

89 IN THE MATTER OF THE DRAINING Commissioners of the First Draining District, &c. } 4338.

In this case a rehearing is granted of our own motion, so as to enable us to correct an error in the decree in regard to the exemption made in the decree relative to book B, without prejudice to the right of parties to ask for rehearing on the merits, within the legal delay dating from the original decree.

90 IN THE MATTER OF THE COMMISSIONERS of the First Draining District, praying for homologation of assessment-roll, &c. } No. 4338.

Our attention having been called to the fact that book No. 2 B, excepted from the operation of our decree herein, embraced the whole of the area that had been drained under the act of 1839, and was by said act exempted, as contended, from the present assessment, the principal question discussed in our former opinion, we, of our own motion, ordered a restricted rehearing, in order to make our decree conform to the views as expressed on the point, as the exemption is in conflict with our conclusions and was made without understanding at the time that this book contained the lands which were alleged to be exempted.

In granting this rehearing, for this limited purpose, we expressly reserved to all parties the right to apply for a rehearing upon the merits. No one except the estate of Davidson has applied for a rehearing.

The grounds upon which this application of the estate of David-
91 son is based are the same upon which we expressed our opinion on the first hearing, and we are not convinced that we erred, and cannot grant a rehearing thereon. As to the correction of our decree, it follows as a matter of course.

It is therefore ordered that the rehearing asked for by the estate of Davidson be refused, and it is further ordered that our decree herein be amended by striking therefrom the phraze, "except that portion designated as book No. 2 B," that the said portion of the assessment-roll be embraced in this judgment of homologation, and that as thus amended the said decree remain undisturbed.

92 IN THE MATTER OF THE COMMISSIONERS of the First Draining District, praying for the homologation of the assessment-rolls, etc., etc.

The estate of John Davidson, one of the opponents herein, applying for a writ of error to the Supreme Court of the United States from the decision of the supreme court of Louisiana just rendered against said opponent, and in order to settle the transcript and avoid unnecessary expense, the following statement of facts has been agreed upon:

1st. That the assessment against property belonging to said succession as shown by the tableau of assessments amounts to about fifty thousand dollars.

2nd. That a portion of the property of said succession against which the assessment is made lies in a section of said district already drained by the New Orleans Draining Company, and has paid for the original drainage assessed in 1835 and 1839.

3rd. About forty-five thousand dollars are assessed against one tract of land belonging to said succession and lying between the Metairie Ridges, the old canal, the new canal, & Lake Pontchartrain, a plan of which is in the possession of Mr. Justice Bradley.

4th. That no drainage has been done on this tract up to the
93 time of the filing of the tableau, the water standing now upon large portions of it.

5th. That in this section of this first draining district large tracts of land belonging to orphan asylums of New Orleans have been sold to pay this draining assessment under these acts of the legislature and bought by the board of drainage commissioners for the amount of the assessment & costs.

6th. That these assessments are being collected by the city of New Orleans under the act of the legislature directing the funds to be collected, to be paid to a company known as the Mississippi & Mexican Gulf Ship-Canal Company, which has been designated by an act of the legislature of Louisiana to do the work at fifty cents per cubic yard for ditching, and fifty cents per cubic yard for leveeing, and when paid in bonds of the city, those bonds are to be taken at (80) eighty cents on the dollar.

7th. That a responsible company organized by leading capitalists of New Orleans made a bid for said work of drainage, offering to do the same for forty cents per cubic yard for leveeing, and the same for ditching, and to take the bonds of the city of New Orleans in settlement and at par, after the passage of said act of the legislature above, 6th, alluded to.

8th. That the testimony establishes that the land in a portion
94 of this draining district, between the Metairie Ridge and Lake Pontchartrain, is worth in its present condition from fifty to one hundred dollars a square, and that the drainage assessment amounts to two hundred dollars a square, and that if drained the value would be increased.

9th. That in the first draining district there has been collected before the filing of this tableau, in money and in property sold to pay the assessment under judicial process, and by amicable arrangement, and bought in by the board, the sum of three hundred & thirty thousand dollars.

10th. The amount of the assessment now presented for homologation is four hundred & fifty thousand dollars.

It is now agreed that the laws and ordinances applicable to & involved in this case shall be presented in the original as published, and need not be copied into the transcript—

And that any document omitted in this transcript necessary to a proper trial of the cause in the Supreme Court of the United States may be taken up in the original.

Mere matters of form in taking up the transcript for writ of error are hereby waived.

ALFRED PHILIPS,
Of Counsel for City of N. O.

H. N. OGDEN,
Atty. for Plff. in Error & Opponent.

GEO. S. LACEY,
Special Atty.

95 This agreement as to the writ of error is taken in the interest & for the benefit, solely, of the estate of Jno. Davidson; and the judgment of the State court so far as every person & party thereto & to the assessment-rolls upon which said judgment was rendered is concerned except the estate of Jno. Davidson, is not in any way or manner to be regarded as affected or impaired by the writ of error applied for.

OGDEN & HILL.

N. O., *Feb'y 12th*, 1874.

96 *Estate of John Davidson.*

Extract from the assessment-roll of the first draining district.

Book B, containing assessments on land from Claiborne street to the lake, between Bayou St. John & New Canal belonging to John Davidson.	403 70 702 82 1,586 67	2,693 19

No. 1 B, containing assessments on lands between St. Peter & Julia streets, Mississippi River & Claiborne street, belonging to John Davidson.		20	29 80	
		21	12 70	
		31	33 80	
		"	7 40	
		32	23 30	
				107 00
No. 2 B, containing assessments on lands between Carondelet walk, Florida Landing, Claiborne street, & Metairie road, belonging to John Davidson.		86	175 65	
		90	221 75	
		"	214 60	
		100	302 10	
				914 10
Book No. 3 B, containing assessments on lands between Bayou St. John, Florida Landing, Metairie road, and Lake Pon'chartrain, belonging to John Davidson.		1	2,830 80	
	Over.			
	97		3,244 43	
			2,208 30	
		2	2,239 05	
			6,040 10	
			1,349 50	
		3	1,798 75	
			234 15	
			233 30	
			175 35	
			131 55	
			131 55	
			187 55	
			161 35	
			151 90	
			151 90	
			206 80	
		5	1,332 39	
			4,145 45	
		6	2,032 55	
		7	1,166 25	
				40,152 97
Total				$43,867 26

A true extract from the documents marked "A & B," on file in this office.
[SEAL.] M. P. JULIAN,
Dy. Clerk.

N. O., *Nov. 9th*, 1874.

98 CLERK'S OFFICE U. S. CIRCUIT COURT,
New Orleans, February 13th, 1874.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the district of Louisiana, do hereby certify that L. C. Roudanez, George Purves, and Alexander Hill, sureties on the bond for a writ of error, "In the matter of the Commissioners of the First Draining District, praying for the homologation of the tableau of assessment," are residents of the city of New Orleans, La.; that in my opinion they are solvent and able to pay the amount of said bond.

Witness my hand and seal of said court this 13th February, 1874.
[SEAL.] F. A. WOOLFLEY, *Clerk.*

99 Know all men by these presents that we, the estate of John Davidson, represented by Henrietta Davidson, executrix, as principal, and L. C. Roudanez, George Purves, & Alex. Hill, as sureties, are held and firmly bound unto the Board of Comrs. of the First Draining District, the Board of Administrators of the City of New Orleans and all parties in interest, in the full and just sum of ten thousand dollars ($10,000) *dollars* to be paid to the said The Board of Comrs. of the First Draining District, the Board of Administrators of the City of New Orleans, the City of New Orleans, and all parties in interest, its certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this thirteenth day of February, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas, lately, at a session of the supreme court of the State of Louisiana, held the ninth day of February, 1874, in a suit depending in said supreme court wherein the City of New Orleans, the Board of Admtrs. of the City of New Orleans, the Board of Comrs. of the First Draining Dist., were plaintiffs, and seeking the homologation of tableau of assessments against the owners of property in the first draining dist., one of whom was the succession of John Davidson, judgment was rendered against the said succession, opponent, and defendant, and the said succession of John Davidson having obtained a writ of error, and filed a copy thereof in the clerk's office of the said supreme court to reverse the judgment in the aforesaid suit, and a citation directed to the said Board of Comrs. of the First Draining Dist., Board of Admtrs. of the City of New Orleans, and the City of New Orleans, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said succession of John Davidson shall prosecute its writ to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

HENRIETTA DAVIDSON, [L. S.]
Executrix.

Sealed in the presence of—

L. C. ROUDANEZ, [L. S.]
Dmp.
GEO. PURVES. [L. S.]
ALEXANDER HILL.

100 The above bond is approved by me this 19th day of February, A. D. 1874.

JOSEPH P. BRADLEY,
Associate Justice Sup. Court U. S.

(Indorsed:) Supreme court. United States circuit court. No. 4338.
vs. bond for writ of error. Filed Febry. 25th, 1874.
M. P. Julian, dy. clerk. Sup. court State of La.

101 4338.

It is hereby agreed that the transcript of the record in the matter of the commissioners of the 1st draining district, praying for the homologation of the assessment-rolls, etc., etc., may be filed by the estate of John Davidson, on the first Monday of November, 1874, in the Supreme

Court of the United States, instead of on the usual return day, without prejudice to the rights of said estate upon writ of error from that court to the supreme court of this State.

ALFRED PHILIPS,
For Commrs.
H. H. WALSH,
Ass't City Atty.

NEW ORLEANS, *Sept. 22nd*, 1874.

SUP. COURT OF LA.
Filed Sept. 22nd, 1874.

M. P. JULIAN,
Dy. Clk.

102 IN THE MATTER OF THE COMMISSIONERS of the 1st Draining District, praying for the homologation of the assessment-roll, etc., etc.

It is hereby agreed that the estate of John Davidson may have until the 1st Monday in December, 1874, to file the transcript in the Supreme Court of the United States in this suit without prejudice to the rights of the said estate under the writ of erorr already allowed.
New Orleans, Oct. 24th, 1874.

GEO. S. LACEY, *Atty.*
H. N. OGDEN,
Atty. for estate of Davidson.

Filed Oct. 24th, 1874.

M. P. JULIAN,
Dy. Clerk Sup. Court.

IN THE MATTER OF THE COMMISSIONERS OF THE 1st Draining District, praying for the homologation of the assessment-roll, etc., etc.

It is hereby agreed that the estate of John Davidson may have until the 1st Monday in December, 1874, to file the transcript in the Supreme Court of the United States in this suit without prejudice to the rights of said estate under the writ of error already allowed.
New Orleans, Oct. 24, 1874.

ALFRED PHILIPS.
GEO. S. LACEY.

103 It is hereby agreed that in making the transcript in this case for the Supreme Court of the United States the clerk of the supreme court of this State need not copy any other portions of the record than those originally transcribed and used in procuring the writ of error; and that either party shall have the right to carry up and use in the original any portion of the record deemed important.
New Orleans, Oct. 24, 1874.

ALFRED PHILIPS.

I hereby consent to the above, with the understanding that the stipulations embodied in a certain agreement attached to the transcript on which the writ was obtained and in the addenda annexed to such agree-

ment are not waived, & are to be complied in carrying this case before the Sup. Court of the U. S.

New Orleans, Oct. 24, 1874.

GEO. S. LACEY, *Atty.*

104 *Certificate.*

SUPREME COURT OF THE STATE OF LA.,
Clerk's Office, New Orleans, Nov. 28th, 1874.

IN THE MATTER OF THE COMMISSIONERS OF the First Draining District, praying for the homologation of the assessment roll, etc. } No. 4338.

I, M. P. Julian, dy. clerk of the supreme court of the State of La., holding sessions at the city of New Orleans, do hereby certify the foregoing to contain a true transcript from the record of the proceedings had in the seventh district court for the parish of Orleans in the above entitled and numbered suit, which record is on the files of this court under No. 4338, and also a true copy of the opinion & decree delivered by this court in said suit, except such parts thereof as the counsel for both parties have agreed to omit.

In testimony whereof I have hereunto set my hand and affixed the seal of this court on this 28th day of November, A D. 1874.

[SEAL.] M. P. JULIAN,
Dy. Clerk.

John M. Howell, clerk, being absent from the State.

(Indorsement on cover:) No. 251. Henrietta Davidson, testamentary executrix of John Davidson, dec., plaintiff in error, vs. The Board of Administrators of the City of New Orleans and the City of New Orleans. Louisiana sup. ct. Filed 8th December, 1874.

In the Supreme Court of the United States.

OCTOBER TERM, 1876.

HENRIETTA DAVIDSON, EXECUTRIX, &c.,
Plaintiff in Error;
vs.
BOARD OF ADMINISTRATORS OF THE CITY OF NEW ORLEANS ET AL.
} No. 33.

BRIEF FOR PLAINTIFF IN ERROR.

This case comes up by writ of error to the Supreme Court of Louisiana under sec. 709, Revised Statutes.

I.

THE FEDERAL QUESTION is whether a certain judgment rendered against the plaintiff in error in pursuance of certain acts of the legislature is not in violation of the Constitution of the United States in that it deprives the plaintiff in error of her property without due process of law.

II.

The question is raised thus:

By an act of the legislature, No. 165, of March 18, 1858, three draining districts in New Orleans and Carrollton were designated; for each a board of five commissioners was appointed with power to dig canals and make levees and provide machinery to draw off the water. They were authorized to levy a uniform assessment per square foot, not exceeding $350,000 in each district, to be collected as the wants of the board required. Upon non-payment of

the assessment judgment was recoverable before any court of competent jurisdiction, and the land might be sold and purchased by the board, and by the board be again sold Acts of 1858, page 114.

By an act, No. 191, of March 17, 1859, each of the several boards was authorized to issue bonds to the amount of $350,000, and thereupon to fix the assessment and apportion the amount yearly to be paid, not exceeding one-tenth of the assessment, to be applied to the payment of interest and redemption of the bonds. Acts of 1859, p. 152.

Subsequently, on the 2d of February, 1871, the following act was passed:

No. 30.] AN ACT

To provide for the drainage of New Orleans.

WHEREAS, The proper and efficient drainage of the city of New Orleans is of paramount importance to the sanitary and commercial interests of the city, as also of the State of Louisiana; and whereas, the Mississippi and Mexican Gulf Ship Canal Company are prepared to immediately undertake the work with the only kind of machinery adapted thereto and now ready for use, and to prosecute the same with energy and economy to completion, therefore—

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That the Mississippi and Mexican Gulf Ship Canal Company, a corporation now existing and domiciled in the city of New Orleans, be and is hereby authorized and empowered to excavate drainage canals and build protection levees within the present corporate limits of New Orleans and Carrollton, under the conditions and with the stipulations hereinafter expressed.

SEC. 2. *Be it further enacted, etc.*, That the said Missis-

sippi and Mexican Gulf Ship Canal Company shall be authorized and empowered to dig a canal and with the earth removed from the same to build outside of said canal a protection levee, in the rear of the city of New Orleans, and near the shore of Lake Pontchartrain; the exact location of said canal and levee and of all canals dug and levees built by the said company to be designated and fixed by the Board of City Administrators, and the title to the lands necessary for said works to be procured and held, for the benefit of the city of New Orleans, by the Board of Administrators of the city of New Orleans; the said lake shore canal to be not less than sixty-five feet on the surface and fifteen feet deep in the middle, with proper slope of the sides, the said canal or canals along the lake shore to serve as a reservoir for draining the city of New Orleans and the lands in the rear of the city, the drainage to be pumped from the canal over into the lake, and the said protection levee to be not less than one hundred feet wide, and of sufficient height to completely protect the city from overflow from Lake Pontchartrain.

Sections 3, 4, and 5 provide for other canals.

SEC. 6. *Be it further enacted, etc.*, That the Board of Administrators shall be required, and that it is hereby made their duty, immediately after the passage of this act, to locate the lines of the canals and protection levees specified in the various sections of this act in time to prevent delay in the prosecution of the work on the part of the said company. The Board of Administrators are also required to build and run all the pumps and drainage machines necessary to lift the drainage water from the said canal or canals over into Lake Pontchartrain, and moreover to keep the water in the canals in process of excavation, so far as practicable, at the proper level for the work of excavation, and at the same time assist the drainage of the adjacent lands; and should the City Council fail to locate the lines of said canals and protec-

tion levees above specified, the city of New Orleans is hereby made liable to the said company for the damages resulting from such delay.

SEC. 8. *Be it further enacted, etc.*, That at the end of every month it shall be the duty of the City Surveyor of New Orleans, or an engineer appointed by the Board of Administrators for that purpose, to examine the work done by the said Mississippi and Mexican Gulf Ship Canal Company during said month, and upon the measurement of the width and depth of the canal, canals or parts of canals dug and protection levees built, certify as to the number of cubic yards excavated and the number of cubic yards of protection levees built during the said month. It shall be the duty of the Administrator of Accounts, on the presentation to him of the said certificate of the City Surveyor or engineer appointed by the Board of Administrators, by the president of the said Mississippi and Mexican Gulf Ship Canal Company, to draw a warrant or warrants on the Administrator of Finance, in payment of the work so done, at the rate of fifty (50) cents per cubic yard of excavation, and fifty (50) cents per cubic yard for the protection levee, the said warrants to be of such denomination as may be required by the president of the said company. These warrants it shall be the duty of the Administrator of Finance to pay on presentation to him, in case there be any funds in the city treasury to the credit of the said Mississippi and Mexican Gulf Ship Canal Company; but should there not be sufficient funds to cash the said warrant or warrants, then the Administrator of Finance is hereby required to indorse upon the same the date of presentation, after which date the said warrant or warrants shall bear interest at the rate of eight per cent. per annum until paid, which condition shall be set forth in the form of the said warrant or warrants.

SEC. 9. *Be it further enacted, etc.*, That in order to provide funds for the payment of the work to be done by the

said company, the three boards of draining commissioners for the draining districts of Orleans and Jefferson, established under the acts of March, 18, 1858, of March 17, 1859, and the several amendments thereto, and any and all other person, persons, or corporations, who may have them in possession, shall transfer to the Board of Administrators of New Orleans all moneys, assessments and claims of drainage in their hands or under their control, all titles to real estate, all books, plans, tableaus, judgments in favor of commissioners, the office furniture of said drainage commissioners, a true statement of the claims of said drainage commissioners against the city, to be adjudicated and settled out of the money collected by the city, and everything pertaining to said draining districts; that the Board of Administrators of New Orleans be and are hereby subrogated to all the rights, powers, and facilities possessed and enjoyed by the commissioners of the several drainage districts, or of any other corporation charged with the duty of drainage and leveeing within the limits of the city of New Orleans and Carrollton; that the Board of Administrators be and are hereby authorized and directed to collect from the holders of property within the said districts the balance due on the assessments, as shown by the books of the first, second, and third drainage districts, under the act of March 18, 1858, that of March 17, 1859, and the several supplementary and amendatory acts thereto, which said assessments are hereby confirmed and made exigible at such time and in such manner as the Board of Administrators may designate; *provided*, that the said Board shall collect the assessments herein authorized in time to provide for the payment of warrants to be issued to the said company at the date of the issue; also to make assessments of two mills per superficial foot in those parts of the three draining districts, as existing under, and created by, the acts of March 16, 1858, and of March 17, 1859, and amendments thereto, and on such other

lands as are brought within the protection levees contemplated by this act, where no assessments have been made; and to execute and enforce the same as provided for by the several acts of the Legislature, creating and regulating said boards of draining commissioners; *provided*, that all money or moneys received by the said Board of Administrators from the said commissioners of the drainage districts, either from the sale of property received from the said commissioners, from the collection of claims for drainage now due, from the collection of drainage assessments, or from any of the sources of revenue contemplated by the provisions of this section of this act, be placed to the credit of the Mississippi and Mexican Gulf Ship Canal Company, and held as a fund to be applied only to the drainage of New Orleans and Carrollton in accordance with the provisions of this act; and that all property not money, so received, shall be held in trust for the payment of the said Mississippi and Mexican Gulf Ship Canal Company, and ultimately for the benefit of New Orleans, should the same not be required for the work of drainage; *and provided further*, that the rights, powers, and faculties possessed and enjoyed by said Board of Administrators of New Orleans, relative to drainage, shall be so construed as not to conflict with the rights, powers, and faculties acquired by the said company, in excavating canals and building levees, as stipulated in the various sections of this act.

III.

The assessment was made and the assessment roll filed in the 7th district court by the administrators of the city of New Orleans, praying judgment against the property and the owner thereof personally for the amounts assessed. Rec., p. 5.

Notice was given by publication to all concerned to show cause why such judgment should not be rendered. Rec., p. 7.

The plaintiff in error appeared and showed for cause, among others, that the said demand was in violation of the 14th amendment of the Constitution of the United States in that the State thereby sought to deprive her of her property without due process of law. Rec., p. 9.

Nevertheless judgment was given against her by the Supreme Court of the State reversing the judgment of the court below in her favor. Rec., p. 25.

IV.

To avoid the necessity of producing the assessment books and the evidence taken in the case, facts deemed material to this inquiry by either party have been agreed by stipulation entered of record. (Rec., pp. 26, 27.) Among them the following:

No drainage has been done on plaintiff's land. Stipulation, art 4.

The whole assessment amounts to about $50,000, of which $45,000 are assessed against one tract which is worth only from one quarter to one-half that amount.

Stipulation, arts. 1, 3, 8.

Tax bill, Book No. 5 B, Rec., p. 28.

A portion of the plaintiff's property does not need draining, having been already drained, and paid the expense thereof. Stipulation, art. 2.

The Mississippi and Mexican Gulf Company is to receive fifty cents per cubic yard for canals and the same rate for levees, payable in bonds of the city of New Orleans at eighty cents on the dollar.

Stipulation, art. 6.

See form of certificate, Rec., p. 10.

Whereas, a responsible company is ready and willing to do the work for forty cents per yard and take the bonds at par, thus saving one-third to the tax payers. Stipulation, art. 7, Rec., p. 27.

That by sales and payments the full sum of $350,000 has been realized in the first drainage district, and the judgments now rendered are for $450,000 more. Stipulation arts. 5, 9, 10.

JURISDICTION.

This court has said in The United States *vs.* Cruikshank, 92 U. S., 542, 554: "The 14th Amendment prohibits a State from depriving any person of life, liberty or property without due process of law, but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the *fundamental rights* which belong to every citizen as a member of society. As was said by Mr. Justice Johnson in Bank of Columbia *vs.* Okely, 4 Wh., 244, it secures 'the individual from the arbitrary exercise of the powers of government, unrestrained by *the established principles of private rights and distributive justice.*'"

And in Loan Association *vs.* Topeka, 20 Wallace, 655, this court has said:

"We have referred to this history of the contest over aid to railroads by taxation to show that the strongest advocates for the validity of these laws * * * conceded that when the purpose for which the tax was to be issued could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power, and was an unauthorized invasion of private rights."

"It must be conceded that there are such rights in every free government beyond the control of the States. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens, subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power,

is after all but a despotism. * * * There are limitations on such power which grow out of the essential nature of all free governments; implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

See also Munn *vs.* Illinois, 94 U. S., 113, 125.

"Of all the powers conferred upon government, that of taxation is the most liable to abuse. Give a purpose or object for which taxation may be lawfully used, and the extent of its exercise is in its very nature unlimited. * * This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no *implied* limitation of the uses for which the power may be exercised."

In People *vs.* Hurlbut, 24 Mich., 44, the court said: "If this charter of State government which we call a constitution were all there was of constitutional command; if the usages, the customs, the maxims that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood and the mutual responsibility of neighborhood witnesses, the precepts which have come from the revolutions which overturned tyrannies, the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils instead of relying upon king or legislature at a distance to do so; if a recognition of all these were to be stricken from the body of our constitutional law a lifeless skeleton might remain, but the living spirit, that which gives it force and attraction, which makes it valuable and draws to it the affections of the people, that which distinguishes it from the numberless constitutions, so called, which in Europe have been set up and thrown down within the last hundred years, many of which in their expression have seemed equally fair and to

possess equal promise with ours, and have only been wanting in the support and vitality which these alone can give, this living and breathing spirit which supplies the words of the written charter would be utterly lost and gone."

Judge Cooley says:

"Taxation is a fearful power, but, like other legislative powers in representative government, it has its checks and balances. It is certainly limited as to *purposes*, and, as has been generally believed, by *local rights immemorially existing and universally recognized*." Taxation, 486–7.

This court, then, has jurisdiction, under the 14th Amendment to the Constitution, to declare void any act of a State legislature, or any judgment of a State court, which shall undertake to deprive a citizen of his property, in violation of "the established principles of private rights, or which transcend the limitations that grow out of the essential nature of free governments."

In this case the plaintiff in error complains of such an act and such a judgment—the one imposing and the other enforcing an assessment upon the property of the plaintiff in error, and a personal liability upon herself.

V.

The plaintiff in error assigns for error:

1. That the court erred in rendering said judgment against the plaintiff in error personally: because an assessment upon land for a local purpose imposes no personal liability upon the owner thereof; nor can such liability be imposed by act of the State legislature.

2. That the court erred in rendering judgment against the land and the owner thereof—

(*a*). Because the legislature of Louisiana, by authorizing and empowering the Mississippi and Mexican Gulf Ship

Canal Company to do the work specified in the act, a[illegible] fixing the price thereof, and compelling the city, by endorsing the certificates of the engineer, to undertake to pay the same, and the land owners within the district to contribute a fund for the purpose has undertaken to compel the city and landowners to enter into a contract for the work.

(*b*). Because the price so fixed, without the consent of the landowners or the city, is extortionate and unreasonable, and the Act 30 of 1871 transfers the money of succession of Davidson to the Mississippi and Mexican Gulf Ship Canal Company without due process of law by arbitrarily ordering 25 per cent. more to be paid for the work than it can be done for, and assessing the superficial foot an amount sufficient to meet the excessive amount donated to the canal company.

(*c*). Because the assessment is made payable, and judgment therefor rendered, before any of the work is done.

(*d*). Because the work is intended for the benefit of a limited part of the city and State, and the burden thereof is imposed upon a class of landowners not benefited.

(*e*). Because judgment is rendered against certain land, and against the plaintiff in error, in respect thereof; which is not to be drained, but has already been drained at its own expense.

(*f*). Because a certain assessment is required to be made in advance of the work, and the surplus, after paying for the work, is to be held for the use of the city of New Orleans.

FIRST ERROR.

The legislature cannot impose a personal obligation to pay a local assessment.

Taylor *vs.* Palmer, 31 Cal., 240, 254.
Neenan *vs.* Smith, 50 Mo., 525.
Followed in 56 Mo., 286, 350.
Contra, Litchfield *vs.* McComber, 42 Barb., 288.

That the assessment in this case is not a tax is admitted by both the State courts, and must be admitted in order to sustain the judgment; for, as a specific tax, it would be in direct violation of the constitution of Louisiana. Opinion in this Case, Rec., p. 12.

It is but recently that the distinction between the powers of the legislature in regard to taxation for the general purposes of government and special assessments for purely local objects has been brought to the attention of the courts. Judge Cooley, in his work on Taxation (pp. 470–1), strongly favors the doctrine of the California and Missouri cases—that the liability of the land owner is limited to the land. He observes, however, that, "In the United States personal assessments of this nature have been enforced in a great number of cases. How much of this may be due to the fact that the right to make a personal assessment was not contested, can only be matter of conjecture; but at present it must be conceded that the overwhelming weight of authority is in favor of the right." Id., pp. 472–3.

In support of this last remark he cites twenty-nine cases, a number which seems to present an overwhelming weight of authority; but acting upon his hint as to the right not having been contested we have examined each of the twenty-nine cases, and find that in but one—that of Litchfield *vs.* McComber, 42 Barbour, 288—was the power of the legislature to authorize a personal judgment to be rendered for a local assesment questioned and sustained. It is true that the opinion in that case refers to the opinion of Judge Duer in New York *vs.* Colgate, 12 N. Y., 44, as having held the same, but we do not so read the opinion, which only says that the legislature might authorize personal judgments, *notwithstanding it had prescribed other remedies.* In the Indiana case—Hazzard *vs.* Heacock, 39 Ind., 172—it was indeed objected that the personal remedy did not exist, but the court answered that the statute provided

that the assessment was to be collected like other taxes which were collected by personal action.

In many of the other cases there was no assertion of the right; it was assumed and not questioned. In some of the cases there was no personal judgment, but the personal liability was asserted *arguendo* or in illustration. We think we are correct in saying that in none other than the case in 42 Barbour was the *power* of the legislature to authorize a personal judgment questioned or distinctly asserted.

SECOND ERROR.

(*a.*) The legislature, by employing the company to do the work, fixing of the price, and requiring that warrants for the work done shall be issued and indorsed, compells the city to make a contract.

The power of the legislature to do this was denied in Vermont in Atkins' *vs.* Randolph, 31 Vt., 226, 236; in Massachusetts in Hampshire *vs.* Franklin, 16 Mass., 76, 84; in New York in Taylor *vs.* Porter, 4 Hill, 143; in Maine in Brummer *vs.* Litchfield, 2 Greenl., 28; in Michigan in People *vs.* Detroit, 28 Mich., 228; in Pennsylvania in Sharpley *vs.* Philadelphia, 21 Penn., 165, and Washington Avenue Case, 69 Penn., 362.

In Sleight *vs.* People, 7 Chic. Leg. N., 292, Schofield, J., said: "The principle upon which alone this can be sustained is that the legislature may, in its pleasure, impose debts upon counties and townships, and require their payment without regard to the wishes of the inhabitants and taxpayers of such counties and townships. * * * But it has been repeatedly held by this court that the legislature is powerless to impose a debt upon a municipality without its consent; and those cases must be deemed conclusive on the questions involved here. The People *vs.* The Mayor, 57 Ills., 18; People *vs.* Salomon, Id., 38; People *vs.* Chicago, Id., 582; Madison Co. *vs.* People, 58 Ills., 463; Hessler *vs.* The Drainage Commissioners, 53 Ills., 105; Livingston *vs.* Wider, Id., 302."

Towns cannot be compelled to subscribe to the stock of a railroad.

People *vs.* Batchellor, 53 N. Y., 128.

In Hasbrouck *vs.* Milwaukie, 13 Wis., 37, the city had undertaken to contract for the improvement of the harbor, and to tax the people for the cost. This was beyond the charter power of the city, and the legislature then undertook to validate the contract. This the court in the case cited said it could not do, Chief Justice Dixon delivering the opinion. In Mills *vs.* Carleton, 29 Wis., 413, the case in 13 Wis. came under review, and the Chief Justice reaffirmed the decision, saying it would be something new if it were held that a legislature might control a subscription to the stock of a railroad or *directly* impose taxes for that purpose without the consent of the people of the town or city or their officers, and he adds: "It is opposed to all our ideas that the legislature might in the first instance have imposed a tax upon the city of Milwaukie for the improvement of the harbor without the consent of the people of that city or of the common council, or that the legislature might do the same thing with respect to a municipal subscription to the stock of a railroad company. And the following authorities in addition to those cited in Hasbrouck *vs.* Milwaukie distinctly affirm the same principle," [citing cases in Maine, Massachusetts, Vermont, and Illinois.] "If *the legislature in such cases has no compulsory power of taxation*, and can only by a proper enabling act submit the matter to the action of the local officers or of the people of the municipality, it would seem to follow that it has no power to cure defects or to waive or supply omissions in past proceedings against the will of the corporation to be charged." * * * * *

Judge Cooley also says that it is natural to suppose that in matters of importance only to themselves, the action of municipal corporations should be left to the judgment of

their citizens and their chosen officers. That, "in those cases in which municipal corporations have been allowed to vote taxes for purposes not strictly local, but on the ground of special benefit, the legislature has seldom gone beyond giving permission to vote them, if the electors of the locality should elect to do so. *Whenever legislation has gone further than this, the courts have generally held that the legislative power of control had been exceeded.*" Taxation, p. 483.

(*c.*) Judgment is rendered before any work done.

"Local improvements can only be constitutional when imposed to pay for local improvements clearly conferring special benefits on the property assessed and to the extent thereof." Hammett *vs.* Philadelphia, 65 Penn. St., 146.

The only ground on which special assessments are imposed is that the property assessed is benefited.

Wright *vs.* Boston, 9 Cush., 232, 241.
Schinly *vs.* Commonwealth, 30 Penn., 29, 57.
Sharp *vs.* Speir, 4 Hill, 82.
Matter of Opening Streets, 20 L. A., 497.
Reeves *vs.* Treasurer Wood County, 8 Ohio S., 338.
Opinion in this Case, Rec., p. 17.

When no benefit has been conferred, and never may be there can be no obligation; and when the price, and consequently the assessment, confessedly exceeds the value of the work there can be no pretence that it is only to the extent of the benefits. This principle receives a startling illustration in the fact that the legislature has recently excluded from the draining district, and relieved the city and the company from all obligation to drain lands of the plaintiff in error, here assessed to over $45,000.

See Act of 1877.
See Appendix.

(*d.*) The work is intended for the benefit of the settled

and improved parts of the city, and the burden should not be imposed upon remote and vacant lands.

The purpose *expressed* in the act of 1870, and other acts *pari materia*, is to improve the health and commercial interests of the city. The 2d section of the act requires the canal to be of a size "to serve as a reservoir for draining the *city* of New Orleans *and the lands* in the rear of the city."

In the Washington Avenue Case, before Thomson, C. J., Read, Agnew, Sharswood, and Williams, JJ. (69 Penna.), where the assessment was per acre, the court said that taxation according to benefits received is not unequal and unjust. So long as the law faithfully and reasonably provides for a just assessment according to the benefits conferred, and does not impose unfair and unequal burdens, it cannot be said to exceed the legislative power of taxation when exercised for proper objects. It is on this ground only that assessments according to frontage of property on a public street to pay for its opening, grading, and paving is to be justified. It is a substitute for assessment under oath by jurors or assessors. But this rule as a practical adjustment of proportional benefits can apply only to cities and large towns where the population is dense. "To apply it to the country and to farm lands would lead to such inequality and injustice as to deprive it of all soundness as a rule or as a substitute for a fair and impartial valuation of benefits in proceedings at law." * * "Judged of by this rule for deciding a question of constitutional power the law in this case cannot stand."

* * * *

"If unreasonable and not a fair substitute for a valuation made by a disinterested tribunal *acting according to the law of the land*, then it plainly is not within the principle of many decisions in this and other States recognizing the

per foot frontage rule as a fair mode of measuring the benefits, and is consequently not a legitimate method of assessment upon the adjacent farm land."

"The legislature therefore made a mistake in fixing such a burden upon the lands along the route of this avenue. It is in fact nothing more than a law to coerce certain land owners to pay for a public improvement in which their interest is no greater, and as to some of them not so great as that of many others who pay nothing, and it offends against the clear intent and spirit of the Bill of Rights."

"There is a clear implication from the primary declaration of the inherent and indefeasible right of property, followed by the clauses guarding it against specific transgressions [in the Constitution] that covers it with an ægis of protection agains all unjust, unreasonable and palpably unequal exactions under any name or pretext."

"I admit that the power to tax is unbounded by any express limit in the Constitution, and that it may be exercised to the full extent of the public exigency."

The act was held void.

Here is a work undertaken for the sanitary and commercial benefit of New Orleans—necessarily for the sanitary and commercial benefit of the people living in the settled parts of the city—not for those, if there are any, living on back lands worth from $35 to $65 per acre, and yet an equal share of the cost is thrown on the back lands.

(*e.*) A part of the assessment is against land not to be drained, and a part of it will be applied to drain lands of other proprietors.

If, as above shown, the only ground of the assessment is benefit to the land, then it cannot be lawful to impose the burden on land not to be drained, the effect whereof is to apply money paid by one person to lighten a burden

imposed on another. The burden should be imposed on all similarly circumstanced, and on those only.

C. J. Bigelow in Dugan *vs.* Boston, 12 All., 223.
Opinion in this Case, Rec., p. 20.

In Morford *vs.* Unger, 8 Iowa, 82, an act extending city limits to include farming land and render it liable to city taxation, was declared unconstitutional on the ground that it rendered the landowner liable to taxes of which he got no benefit.

(*f.*) The surplus of the assessments is to be paid over to the city of New Orleans.

This is imposing a tax on part of the community for the benefit of the whole, it raising a revenue for general purposes by special assessments for local improvement.

VII.

It is impossible not to see in this case the assertion of a power which, as Judge Cooley remarks, might have imposed on the city of New York the cost of the Erie canal, or St. Louis or Chicago the cost of constructing a system of railroads throughout their respective States.

The lands are in a state of nature, and if they constitute a nuisance, the owners ought at least to be allowed to abate it in their own way; but without their consent asked, agents are designated by the legislature to lay out canals and levees, and dig and build; and for such work, to exact from the land owner a price exceeding, in this case, double the value of his land. And as the land itself is not worth enough to pay the tax, a personal judgment is rendered against him, which may be enforced against his property anywhere in the State, or anywhere in the United States, or anywhere in the world. Under the power here claimed, the possession of an acre of land in any State gives its legislature the power to exhaust the entire fortune of the owner, whether situated

in or out of the State, in special assessments upon that acre.

If such a power be conceded, the day will come when it will be used; and the legislator, relieved from all responsibility, will vote for works of improvement to give employment to needy constituents, or wealth to favored friends.

Judge Cooley in his work on Taxation expresses in forcible language the danger and the error of the doctrine that the legislature can compel the levy of any tax for such purposes. I extract some sentences:

"It is not difficult to give the most reckless robbery for private purposes the forms of constitutional action." P. 486."

"It is difficult to conceive of a more corrupting power than that of voting taxes by those who are not to feel them, especially when the expenditure may be confided to those who have no interest personally or as corporators, and who will presumably be concerned only to the extent that they can make a personal profit of the taxes which others pay." P. 491.

"It must, we should suppose, be conceded that the doctrine that the legislature may do anything to which it gives the *form of taxation*, and which is not expressly forbidden by the Constitution, is necessarily corrupting in practice. It constitutes a standing invitation to the corrupt classes of the State to flock to the State capital with schemes for enriching themselves at the expense of localities, and it would be remarkable if they were not often successful. Perhaps if the State were the owner of important public works a more tempting attraction might thereby be presented and the municipality left unmolested; but even this may prove otherwise, for the evils of vicious legislation are likely to increase and multiply in every direction when once it is admitted that they are subject to no legal

restraints, and that the central authority may legislate on matters which concern only the locality, and concerning which the members acting will know nothing except as interested parties may undertake to inform or misinform them." P. 493.

Conclusion.

We submit that the judgment should be reversed, and the case remanded to the Supreme Court of Louisiana, with direction to affirm the judgment of the court below—the Seventh District Court.

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APPENDIX.

It may be conceded that the legislature can compel the work of drainage to be performed by the owner, or even designate the means by which it shall be done, whether by a board of commissioners, a corporation, or an individual. If these are proper exercises of the police power of the State, yet the jurisprudence of Louisiana and every other State whose reports we have examined clearly shows that no burden can be put upon the owner except what is required to perform the work—in this case more than 75 or 80 per cent. of the amount of the judgment. Hence the rule of adverting for bids in the opening, paving, and repairing of streets, for the construction of levees along the Mississippi, and for other works where by operation of law an obligation is created against a proprietor without his consent. Certain prerequisites are essential in the nature of things to prevent the legislature from declaring that the property of A shall arbitrarily be transferred to B under color of its being done by a contract and for a consideration. In the suit at bar the assessment of 3 3-10 mills made for the purpose of paying the principal and interest of bonds never issued is by the determination of the legislature needed to raise an amount sufficient to pay for the proposed work of drainage at the rate of 50 cents per cubic yard ditching and 50 cents per cubic yard leveeing. The assessment and the rate therefor paid for the work to be done, deprive the succession of Davidson of its property and give it to the Mississippi and Mexican Gulf Ship Canal Company to the amount of 25 per cent. of every dollar collected from said succession without due process of law, in clear violation of the XIV Amendment of the Constitution of the United States. "Nor shall any

State deprive any person of life, liberty, or property without due proceess of law." Suppose in the exercise of its police power the legislature of Louisiana had declared that, tired of the litigation in its courts made by the widow and heirs of John Davidson in this or any other matter, that it had enacted that on the 1st of January, 1876, they should be hung. Would the trial of the parties under this enactment be a process of law, and the Supreme Court of Louisiana had upheld it, and we had obtained a writ of error to this court; and would this court have hesitated to declare that the decison of the Supreme Court of Louisiana should be reversed as violating the prohibitions of the XIV Amendment.

Suppose the legislature had for the purpose of draining these very lands in New Orleans enacted that all the Germans and Irish should be imprisoned until they gave one week out of every month to the labor of ditching, canaling, and leveeing these swamp lands, and if the courts of Louisiana had upheld these enacments, shielding abuse of power in them by calling them simply the exercise of the police power, is there any doubt of the action of this court, when appealed to by writ of error, declaring that the judgment of the Supreme Court of Louisiana had deprived the German and Irish inhabitants of New Orleans of their liberty without due process of law?

Nor is there any better reason why the sacred police power of Louisiana should be permitted to deprive a certain class who are swamp land owners of 25 per cent. over and above what is needed to drain their land under an act of the legislature of Louisiana, which compels that amount to be paid over to the Mississippi and Mexican Gulf Ship Canal Company without consideration, when paying for every cubic yard of ditch or levee to be constructed. The XIV Amendment as clearly prohibits this depriving of property of the class of swamp land owners as it does the depriving of liberty of the Germans and

Irish of New Orleans, or as it prohibits the hanging of the widow and heirs of John Davidson on a mere act of the legislature. The mere fact of litigation in the State courts does not constitute process of law. For if the Courts accept the enactments of the legislature, and execute them as laws, then the property of A can be transferred to B by legislative will. And if it be a bar to the jurisdiction of this court that suit was had in the State courts, and process of law therefor obtained, then no writ of error can ever lie to this court, no matter what the flagrancy of the legislative will in depriving one of his well-earned wealth, to lavish it upon legislative favorites and rings. The XIV Amendment avails nothing, although it prohibits such transfers.

The charge that we have had due process of law is playing upon words, when, if it debars us from appearing in this court, we are remanded to our State courts to execute a legislative mandate, where our property is transferred without consideration of cause to the Mississippi and Mexican Gulf Canal Company because the legislature has so decreed.

AN ACT

To provide for leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That for the purposes of this act, all that portion of the parish of Orleans lying and being within the following limits, viz.: beginning at the Mississippi river at Julia street, following said street to the canal of the New Orleans Canal and Banking Company, following said canal as far as Lake Pontchartrain, along said lake to Bayou St. John, following said bayou to the Canal Carondelet, along said canal to St. Peter street, along St. Peter street to the river, following the banks of the river to the starting point, shall constitute the first leveeing and draining district.

2. That the following portions of the parishes of Orleans and Jefferson, viz.: beginning at the Mississippi river at the upper side of Julia street, along Julia street to Mobile Landing, along said landing to Delord street, along Delord street and the upper side of the canal of the New Orleans Canal and Banking Company, following said canal to Lake Pontchartrain, along the shores of said lake to the Jefferson and Pontchartrain railroad, following said road to the river Mississippi, and following the banks of said river to the starting point, shall constitute the second leveeing and draining district.

3. And all that portion of the parish of Orleans lying and being within the following limits, viz.: from the river Mississippi, at St. Peter street, along the lower side of said street to Canal Carondelet, following said canal to Bayou St. John, along said bayou to lake Pontchartrain, along the shores of said lake to Lafayette avenue, follow-

ing said avenue to the river Mississippi, along the banks of said river to the starting point, shall constitute the third leveeing and draining district.

SEC. 2. *Be it further enacted, etc.*, That for the purpose of carrying into effect the provisions of this act, there shall be *three boards of commissioners*, to be appointed and organized as follows: One to be designated and known as the *Board of Commissioners of the first draining district:* one as the *Board of Commissioners of the second draining district;* and one as the *Board of Commissioners of the third draining district.* Each Board of Commissioners shall be composed of five persons, residents of the district for which they are appointed. The Board of Commissioners of the *first* and *third draining districts* shall be appointed by the mayor of the city of New Orleans, by and with the advice and consent of the board of aldermen of said city; and the Board of Commissioners of the *second draining district* shall be composed of five persons, residents of the said district, to be appointed as follows, viz.: *two* by the mayor of the city of New Orleans, by and with the advice and consent of the board of aldermen of the city; *one* by the council of the city of Jefferson; *one* by the police jury of the parish of Jefferson; and *one* by the council of the town of Carrollton. Said commissioners shall serve for the term of four years. *And no member of the common council of the city of New Orleans, of the police jury of the parish of Jefferson, or of the councils of the city of Jefferson and town of Carrollton*, shall, during *the term for which they have been elected, be eligible as commissioners in either of the districts aforesaid.*

SEC. 3. *Be it further enacted, etc.*, That at the first meeting of the Boards of Commissioners of the first and third draining districts, the said boards shall be divided by lot into two classes. The seats of the first class shall be vacated at the end of two years, and the seats of the second class shall be vacated at the end of four years;

Provided, That three members shall constitute the first class, and two members shall constitute the second class, and that every two years thereafter the mayor, as aforesaid, shall appoint, as hereinbefore provided, commissioners to fill the vacancies in each board, whose terms may have expired. And in case of vacancy by death, resignation, or otherwise, the mayor shall appoint, in the same manner as hereinbefore provided, commissioners to fill the vacancies of the unexpired term. It being understood that the Board of Commissioners for the second draining district shall serve for the full term of four years, and in case of vacancy by death, resignation, or otherwise, in said board, such vacancy shall be filled by the authority making the original appointment.

SEC. 4. *Be it further enacted, etc.*, That the said Boards of Commissioners are hereby invested with all the rights and powers necessary to thoroughly drain the several draining districts, as expressed in the first section of this act, and to that end shall have the right at all times of entering on the lands within the limits of the districts aforesaid, and of placing thereon their engines and machinery, and of freely passing over and using the same, and of digging all necessary canals and drains, making all necessary embankments and levees, and of doing all things lawful to be done, which may be useful or necessary in draining, cleaning and reclaiming the land within said districts. Said Boards of Commissioners are authorized to cut their canals and drains through the streets and squares; and in the event of any street selected for the location of a canal being too narrow for a draining canal and a public highway, the said Boards of Commissioners may cause such streets to be widened; *Provided*, however, that any person or corporation shall have the right, by petition, addressed to any court of competent jurisdiction, to oppose any acts of the boards, in the exercise of the powers conferred by this section on said boards, and it

shall be the duty of such court summarily to hear and determine the same, after a full hearing of both parties, and such courts shall limit the action of the board to the exercise of the powers herein conferred, in carrying into effect the provisions of this act according to its true intent and meaning; and when the same cannot be done without injury or loss to the complainant, said court shall award adequate compensation; *And provided, also*, That on an appeal to the Supreme Court, the trial of the same shall have priority and preference over all other cases therein; and on such appeals, the said boards shall only be required to give security for costs of appeals; *And provided further*, That in any such suit nothing herein contained shall prevent said boards from recovering judgment against any such complainant or complainants for damages, where it can be shown that such have been incurred, and that such suit or suits were brought on frivolous grounds, or from improper motives.

SEC. 5. *Be it further enacted, etc.*, That said boards shall each have the right to sue and be sued; to contract for works necessary to be done under this act; to have a seal, and to alter the same; to accept and receive any gift, legacy or donation that may be made or left in their favor, and generally to do all that may be convenient or necessary for the performance of the duties which are imposed upon them, or that may be requisite for the welfare and success of the plan of operations which are confided to them by this act, but not beyond the powers herein conferred.

SEC. 6. *Be it further enacted, etc.*, That the domicil of the said Boards of Commissioners shall be located in the city of New Orleans. Each board shall organize within fifteen days after their appointment, or as soon thereafter as practicable; and shall appoint one of their number as president, on whom legal service of all process or citation against such board shall be made. Each Board of Com-

missioners is hereby empowered and authorized to appoint such officers, and to make such by-laws, rules and regulations for their own government as they may see fit, and from time to time to change the same, under such restrictions as they may think proper to impose.

SEC. 7. *Be it further enacted, etc.*, That said Boards of Commissioners shall have the right to proceed, and are hereby empowered to levee, drain, and reclaim the lands embraced within their respective draining sections or districts, as established by this act in the following manner: Whenever either of said Boards of Commissioners is prepared to drain their respective section or district, such Board of Commissioners shall cause a plan thereof to be made, accurately designating the limits of the section or district to be drained, and, as far as possible, the subdivision of the property therein contained, and the names of the proprietors, as also the dimensions and directions of the canals intended to be dug, and the place where the steam engines will be established. Such plan or plans shall be deposited in the office of the recorder of mortgages of the parish in which the section or district to be drained is situate, and notices shall be inserted, in French and English, in two newspapers published in said city of New Orleans, at least once a week during four weeks in succession, announcing that such Board of Commissioners will proceed to drain such section, describing the place where the plan thereof is deposited, accurately defining the limits thereof, and indicating, as nearly as possible, the time within which the draining thereof will be completed, and the probable cost of said works. After such publications such Board of Commissioners shall apply by petition to one of the district courts in the parish of Orleans, for that portion of the section or district lying within the limits of said parish, and to the district court in the parish of Jefferson, for that portion of the section or district lying within said parish; which court or courts, upon due proof being made of the

publications of said notices aforesaid, shall decree that each portion of the property situated within the said limits is subject to a first mortgage, lien, and privilege in favor of such Board of Commissioners, for such amount as may be assessed upon such property for its proportion of the costs of draining such section or district, and interest thereon at six per centum per annum from demand thereof. The decree of the district court in the parish of Orleans shall be recorded in the office of the recorder of mortgages in and for said parish, and the decree of the district court of the parish of Jefferson shall be recorded in the office of the parish recorder of said parish, and a certified copy of the aforesaid plan or plans shall also be deposited in each of said offices for the information of said recorders. Said recorders shall be entitled to twenty dollars each for the recording of the said decree and the deposit of said plan or plans; and in case they be required by said Boards of Commissioners to record the said decree in the name of any or all of the proprietors of real property within said section or district, they shall be entitled to receive fifty cents for such special recording; and whenever the said recorders, or either of them, may be required to deliver a certificate of mortgages on any real property embraced within said draining section or district, such recorder shall mention therein that such property is subject to a lien, privilege, and first mortgage in favor of the Board of Commissioners of the section or district in which such property is situate, for such sum of money as may be assessed on such property for the draining thereof. Said lien, privilege, and first mortgage shall take precedence over all mortgages, liens, and privileges whatsoever, whether tacit, conventional, legal, or judicial, and shall attach to said property until the amount assessed and the interest thereon shall have been paid in full.

SEC. 8. *Be it further enacted, etc.*, That said Boards of Commissioners, each within its own section or district,

shall have the right, and are hereby authorized and empowered to levy such uniform assessment or assessments upon the superficial square foot of lands situated within the draining section or district of such board to defray the construction of the levees, machinery, canals, and other works necessary for the purpose of carrying out the provisions of this act, as applicable to its particular district, which shall be collected from time to time, as the wants of such Board or Boards of Commissioners may require; *Provided*, however, that the same shall not in the aggregate, for any one district, exceed the sum of three hundred and fifty thousand dollars; *And provided further*, Not more than one-half of said amount shall be demandable within two years after the passage of this act.

SEC. 9. *Be it further enacted, etc.*, That on non-payment of the amount of the assessment, judgment therefor shall be recoverable before any court of competent jurisdiction, and the land so assessed shall be sold according to law, and each board are hereby authorized to purchase the same, and shall hold or dispose of the same for the benefit of such draining district; *Provided*, That the sale thereof shall be made at public auction, after thirty days' notice, by three advertisements in some newspaper published in such district; *And provided further*, That the price of such sale shall fully cover the amount of the judgment, with all costs and interest up to the time of purchase by such draining district, with six per cent. per annum interest upon the aggregate so formed, from that time until its extinction, by the board, and if, while the property of the draining district, such property would have become liable to any further assessment, the sale shall also cover the amount thereof.

SEC. 10. *Be it further enacted, etc.*, That no compensation shall be allowed to said commissioners for their services, but they shall have the right to appoint and employ such officers and employees as they may deem proper, and fix

their salaries or compensations; and said commissioners shall make annual reports of all their operations under this act to the common council of the city of New Orleans, and as often as required so to do by said council.

SEC. 11. *Be it further enacted, etc.*, That the sum of eighty-one thousand dollars be and the same is hereby appropriated out of the swamp land fund of the first swamp land district of this State, to aid in carrying out the object of this act. The sum so appropriated shall be equally divided among the said draining sections or districts as fixed by this act, and in proportion to the area of district to be drained.

SEC. 12. *Be it further enacted, etc.*, That the legislature reserves the right of repealing, altering, changing or modifying this act.

SEC. 13. *Be it further enacted, etc.*, That this act shall take effect and be in full force from and after its passage, and that all laws or parts of laws contrary to, or in anywise conflicting with, the provisions of this act be and the same are hereby repealed.

Approved March 18, 1858.

AN ACT

Supplementary to an act entitled "An act to provide for leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," approved March the eighteenth, eighteen hundred and fifty-eight.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That in order to enable the several Boards of Commissioners created under and by virtue of the act entitled "An act to provide for leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," approved March the eighteenth, eighteen

hundred and fifty-eight, to carry into effect and to commence immediately the works therein contemplated, *each* of said Board of Commissioners be, and are hereby, authorized and empowered to issue bonds of the sum of five hundred dollars each, having not more than thirty years to run, and bearing interest not exceeding eight per cent. per annum; the said bonds shall be designated as "draining bonds," and shall be signed by the president and countersigned by the secretary of the Board of Commissioners issuing them: *Provided*, That the total amount of bonds so issued shall not, for any one draining section or district exceed the sum of three hundred and fifty thousand dollars.

SEC. 2. *Be it fuather enacted, etc.*, That it shall be the duty of the Boards of Commissioners aforesaid, upon issuing draining bonds, as authorized by the first section of this act, to fix and determine the amount of assessment to be levied upon the superficial or square foot of land situate within the draining district or section of such board or boards, in conformity with the provisions of the aforecited act, entitled "An act to provide for leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," approved March the eighteenth, eighteen hundred and fifty-eight, and fix and apportion the amount to be paid *yearly* by the owner or owners of said lands, in order to pay the annual interest on said bonds, and such bonds as may mature: *Provided*, That the amount of assessment demandable and collectable yearly shall not exceed in the aggregate more than one-tenth of such assessment.

SEC. 3. *Be it further enacted, etc.*, That it shall be the duty of each of said boards of Commissioners daily, upon receipt of any sum or sums of money in payment of any assessment levied as aforesaid, to deposit the same with the "fiscal agent" of the city of New Orleans, to the credit of the draining fund of its section or district, and the amount or amounts so deposited with said fiscal agent,

as a special fund for the payment of the annual interest on said draining bonds, and the redemption of said bonds at maturity, shall only be drawn therefrom to pay said annual interest or redeem said bonds, or for the purpose of purchasing bonds, as hereinafter provided: *Provided*, That no portion of said fund shall be drawn except by virtue of a resolution of the Board of Commissioners depositing the same and for the purposes aforesaid.

SEC. 4. *Be it further enacted, etc.*, That whenever, after the payment of the annual interest on said bonds, and of such bonds as have matured, the amount remaining with said fiscal agent to the credit of the draining fund aforesaid, of either of said draining sections or districts, shall exceed the sum of ten thousand dollars, it shall be the duty of the Board of Commissioners of such section or district to advertise during thirty days in the official journal of the city of New Orleans for sealed proposals for the sale to said board of such of the draining bonds thereof, having the shortest period to run, and amounting to the sum so remaining on deposit as aforesaid; and at the expiration of said publication said Board of Commissioners shall open said sealed proposals and accept the lowest bid or bids: *Provided*, That no bid shall be accepted which demands more than the face of the bonds.

SEC. 5. *Be it further enacted, etc.*, That after the completion of the works for the leveeing, draining and reclaiming of either of the draining sections or districts aforesaid, the Boards of Commissioners thereof shall annually make an estimate of the amount required to keep up and maintain the said works and continue the drainage thereof, and shall furnish the said estimate to the common council of the city of New Orleans, for that portion lying within the limits of said city, and to the police jury of the parish of Jefferson for that portion lying within the limits of the parish of Jefferson; and it shall be the duty of the said com-

mon council and the said police jury, respectively, to levy a uniform tax or assessment upon the superficial or square foot of the lands situated within said draining sections or districts, respectively, sufficient to meet the amounts respectively required; and the tax or assessment so levied shall be collected in the same manner as the city and parish taxes, and paid unto the respective Boards of Commissioners, who shall disburse and account for the same.

SEC. 6. *Be it further enacted, etc.*, That it shall be the duty of each of said Boards of Commissioners, in the month of January of each year, to make a full and complete report to the common council of the city of New Orleans and the police jury of the parish of Jefferson, respectively, showing what works have been made or may be in progress, the condition and costs thereof; what bonds have been issued, and the amount derived therefrom; the disposition thereof; what amounts from assessments have been paid; the condition of the trust fund, and generally all such other information as may be required or be of interest.

SEC. 7. *Be it further enacted, etc.*, That the bonds which may be issued by either of said Board of Commissioners by virtue of this act shall be exempt from any and all taxation in whose hands the same may be found.

SEC. 8. *Be it further enacted, etc.*, That the said Boards of Commissioners shall have at all times access to and the right of copying, or causing to be copied, any plan or parts of plans of the city of New Orleans and the parish of Jefferson in the possession or keeping of the common council of the said city of New Orleans, or of the parochial authorities, or of any surveyor or other officer thereof, to be certified by such custodian to be a correct copy or copies thereof, and the same to include the street or streets, roads or highways of any portion or section thereof to be drained, according to the provisions of this act and of the act to which this act is supplementary.

SEC. 9. *Be it further enacted, etc.*, That this act shall take

effect and be in full force from and after its passage.

Approved March 17, 1859.

No. 108.] AN ACT

To amend an act entitled "An act supplementary to an act entitled an act to provide for leveeing, draining, and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson," approved March 18, 1858.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana in General Assembly convened*, That section fifth of the above-mentioned act shall be so amended and re-enacted so as to read as follows: That for the construction and completion of the works for the leveeing, draining, and reclaiming of either of the draining sections or districts aforesaid, the Board of Commissioners thereof shall annually make an estimate of the amount required to construct, keep up, and maintain said works.

SEC. 2. *Be it further enacted, etc.*, That all the remaining portion of section fifth shall remain as it is now in the original act, and that this act take effect from and after its passage.

Approved March 14, 1860.

No. 57.] AN ACT

To provide for the collection of the assessment for draining under the acts of March 18, 1858, and the act supplementary thereto of March 17, 1859.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in Genereral Assembly convened*, That the amount of assessment which the Board of Commissioners of the several draining districts are

authorized to fix, and apportion to be paid yearly by the owner or owners of the lands within said districts, in order to pay the annual interest on the bonds issued, or to be issued, by said Board of Commissioners, and such bonds as may mature by virtue of the second section of an act supplementary to an act to provide for leveeing, draining and reclaiming swamp lands in certain portions of the parishes of Orleans and Jefferson, approved March 18, 1858, shall be collected and sued for by the following mode of proceedings, to wit: As soon as any assessment has been made, and notice thereof shall have been given, a copy thereof shall be filed in the third district court of New Orleans for the assessment made on property within the limits of the parish of Orleans, and in the third judicial district court sitting at Carrollton for assessments made on property within the limits of the parish of Jefferson, in which tableau of assessments thus to be filed the property assessed shall be set forth, together with the amount assessed and the names of the owners thereof, if known; and if the owners' names are not known, then it shall be stated in said assessment roll that the property assessed belongs to owners unknown; that a petition shall be filed with said assessment roll, praying for an order that all persons whom it may concern do show cause within thirty days from the first publication of said order, if any they have, why said assessment roll should not be approved and homologated; that said order thus rendered shall be published in the English and French languages at least twice each week, for thirty days, in one newspaper published in the city of New Orleans, as to the order of the third district court of New Orleans, and in one newspaper published in the parish of Jefferson, as to the order of the third judicial district court, sitting at Carrollton; and after said publications the said courts shall, on motion of the counsel of said Boards of Commissioners, approve and homologate said assessment rolls, which shall be a

judgment against the property assessed, and the owners thereof; on which execution may issue as on judgments rendered in the ordinary mode of proceedings; and the court shall, at the same time and in the same judgment, order the delinquent parties to pay ten per cent., in addition to the amount assessed, to pay cost and counsel fees.

SEC. 2. *Be it further enacted, etc.*, That this act shall take effect from and after its passage.

Approved March 1, 1861.

AN ACT

To provide for the drainage of New Orleans.

SEC. 3. *Be it further enacted, etc.*, That said company shal also be authorized and empowered to excavate canals of the dimensions and at such localities as may be fixed by the Board of Administrators of the city of New Orleans, which shall fully drain the area bounded by the protection levees herein contemplated and the Mississippi river and connect with the drainage canals now located in the said area.

SEC. 4. *Be it further enacted, etc.*, That the said company shall also be empowered and authorized to build a canal and protection levee, below the city of New Orleans, to connect the lower end of the protection levee along the lake with the Mississippi, of a sufficient size to fully protect the city from overflow, and on a line to be designated by the Board of Administrators; and to construct a like canal and protection levee above the city, the dimensions and locality in like manner to be designated by the said Board of Administrators; the object of these two canals and protection levees to be the protection from overflow of the areas between the Mississippi river and Lake Pontchartrain, above the new or company canal, and below the Carondelet canal.

SEC. 5. *Be it further enacted, etc.*, That the said Mississippi and Mexican Gulf Ship Canal Company shall be authorized and empowered to dig all the smaller canals, required for the drainage of New Orleans and the lands in the rear of the said city, of the dimensions of ten feet or more than ten feet in width.

SEC. 7. *Be it further enacted, etc.*, That said Mississippi and Mexican Gulf Ship Canal Company shall be required to have ready for work, within fifteen days after the passage of this act, machinery of sufficient power to excavate at least twenty-five thousand (25,000) cubic yards per month, and to move the same the distance required to build the protection levee, and to increase as soon as practicable their machinery to the capacity of at least fifty thousand cubic yards per month.

SEC. 10. *Be it further enacted, etc.*, That all acts and parts of acts in conflict with, or inconsistent with the various provisions of this act, are hereby repealed, and especially the act entitled "An act to repeal all laws and parts of laws creating drainage districts in certain portions of the parishes of Orleans, Jefferson," etc., passed March 2, 1869, generally known as the Ship Island Canal bill; also, an act amendatory thereto, approved March 16, 1870.

SEC. 11. *Be it further enacted, etc.*, That it is hereby made the duty of the Board of Administrators to see that the parties whose duty it is to do the same, shall, immediately after the passage of this act, build such levees on both sides of the Carondelet canal, and the New or Canal and Banking Company's canal, extending to Lake Pontchartrain, and around their basins, as to effectually prevent the overflow of water from the said canals during storm, tides or high water in Lake Pontchartrain, the dimensions of said levee to be determind by the Board of Administrators.

SEC. 12. *Be it further enacted, etc.*, That this act shall be favorably construed, so as to favor all the purposes and

objects of the same and the operations of the provisions thereof, and shall take effect from and after its passage.

(Signed) GEO. W. CARTER,
Speaker of the House of Representatives.

(Signed) OSCAR J. DUNN,
Lieut. Gov. and President of the Senate.

A true copy:

GEO. E. BOVEE,
Secretary of State.

IN THE SUPREME COURT

OF THE UNITED STATES.

No. 33.

HENRIETTA DAVIDSON, EX.

vs.

BOARD OF ADMINISTRATORS OF THE CITY OF NEW ORLEANS, AND THE CITY OF NEW ORLEANS.

Brief of P. PHILLIPS,

For Defendants in Error.

October 1, 1877.

R. O. Polkinhorn, pr.

Supreme Court of the U. S.

HENRIETTA DAVIDSON, *Ex.*,
vs.
BOARD OF ADMINISTRATORS OF THE CITY OF NEW ORLEANS, AND THE CITY OF NEW ORLEANS.

No. 33.

Brief of P. PHILLIPS

for Defendants in Error.

The city of New Orleans and the Board of Administrators, charged by certain acts of the State of Louisiana with the duty of draining and leveeing within the limits of the city of New Orleans and Carrolton, presented their tableau of assessments to the Seventh District Court for the Parish of Orleans, with the prayer that the same may be homologated.

Mrs. Davidson (plaintiff in Error) among others assessed, appeared and filed her exceptions and opposition thereto. p. 8.

She objected to the construction placed by the administrators on the acts under which they had proceeded, and on various grounds assailed them as violative of the State constitution, and of the Constitution of the United States.

The District Court overruled the constitutional objections, but held that the administrators had not properly executed their powers, and so it vacated the assessment, with leave to the plaintiffs " to present a new tableau and assessment according to law." p. 21.

From this judgment the plaintiffs appealed to the Supreme Court of the State, where the judgment appealed from was reversed and the oppositions dismissed " at the cost of the opponents respectively."

Mrs. Davidson, one of these opponents, now brings her writ of error to reverse the judgment of the Supreme Court of the State.

The exceptions taken in the District Court, which rest upon the construction of these acts, or question their validity under the State constitution, are entitled to no notice whatever, as the decision of such questions by the State Court are obligatory upon this tribunal.

The exceptions, however, reach further, and insist that these acts are also in conflict with the Federal Constitution.

It is contended that their "direct effect is to take from the people a power, which from time immemorial has been exercised through their local municipal governments, and confer it upon the Legislature."

That this right " to manage their local affairs," through reprsentatives in their municipal governments, is inherent in the people of every State in the Union, antedating their constitutions, and reserved by implication in those instruments.

On this preface is based the averment that these acts not only violate the State constitution, but also " Article 4, Section 4 of the Constitution of the United States."

Again, that " if said acts are to be regarded as an exercise of the right of eminent domain, they violate the Fifth Amendment."

Again, as the homologation is to operate as a judgment on which execution may issue, and many superfi-

cial feet of the land are not worth the amount of the assessment, any such judgment would violate " Articles 5, 13, and 14 of the Amendments. pp. 8, 9.

As there is no assignment of errors in the Supreme Court of the State, we have no means of ascertaining what constitutional questions were there urged, and what were there decided.

The opinion of that Court opens with the curt remark that, " As the constitutional questions raised in the proceeding have in our opinion been decided in the case of the Draining Company, 11 A. 370, we think it necessary to consider only the following grounds of opposition as argued before us."

To confer the jurisdiction on this Court to reverse the judgment complained of, it is necessary to show that a Federal question was not only raised, but decided.

Waiving, however, this ground of objection, we have then the propositions that the acts are violative of the following provisions of the Federal Constitution: " The United States shall guarantee to every State in this Union a republican form of Government." (Art. 4, IV sec.)

" Nor shall any person be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation." (V Amendment.)

" Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States." (XIII Amendment.)

" Nor shall any State deprive any person of life, liberty or property without due process of law." (XIV Amendment.)

Let us enquire what is the character of the legislation against which these constitutional provisions are invoked.

As early as 19th March, 1835, an act was passed entitled "An act to provide for the draining and clearing of the marshy grounds and cypress swamps, situated between the city of New Orleans, its incorporated suburbs and Lake Ponchartrain." (Acts of 1835, p. 70.)

Its preamble recites: "That in accordance with the opinion of physicians of the greatest experience, it appears that the epidemics which, with few exceptions, have annually prevailed in the city of New Orleans and its faubourgs, are in general to be attributed to two causes—intense heat and excessive humidity, which, when combined, frequently produce the most fatal diseases; and, although the limited power of man cannot obviate or control the first, he may yet mitigate its virulence by adopting such means as will effect a free circulation of air; and the latter would be, in a great measure, if not entirely, removed by draining off the stagnant waters which accumulate on the low and marshy grounds.

And after the draining of the aforesaid grounds shall have been accomplished, if the woods, which at present nearly cover the entire space between Lake Ponchartrain and the said city and faubourgs, be cut down and removed, it is more than probable that the salubrious breezes from said Lake will be felt to the banks of the Mississippi, and after passing over a well drained surface reach the said city free from those exhalations which are now brought thither by winds blowing from that quarter, vitiating the atmosphere and proving fatal to human life.

That the improvements aforesaid form an object of serious importance, not only to the inhabitants of said city and faubourgs, but also to every section of the State

as their inevitable results would be the increase of population, and the general prosperity thereof.

So important and desirable an object can only be effected through the medium of a large capital, in consequence of the immense expense necessarily attending the undertaking thereof, and which the proprietors of the soil may want either the means or the inclination to provide for the same, particularly as the success of an enterprise of this nature chiefly depends upon the preparation and adoption of a judicious plan of well combined operations on which it might be impossible for them to agree.

And it being a well established maxim among all civilized nations, that the welfare of society always has precedence over the interests or will of individuals, should it conflict with the same, it hence becomes the duty of those to whom the legislature is confided, to prescribe and adopt the most efficient measures for the accomplishment of so important an object.

Be it therefore enacted, &c.—

On the 20 March, 1839, an amendatory act way passed with the following preamble:

"*Whereas* the draining of the low and marshy grounds behind the first municipality of the City of New Orleans by the Draining Company has proved completely successful;

Whereas, similar experiments made by citizens on their plantations on the Mississippi have been attended with the same beneficial results, whereby the practicapability and utility of the system of draining lately adopted by the State has been fully and satisfactorily tested, but certain difficulties are found to exist in the execution of several provisions of the former act. Be it therefore, &c.

It is only necessary to say that these acts organize a board, with authority to drain the swamp lands by a

previously prepared plan, designating the sections, and also the names of the proprietors. This plan is directed to be deposited in the Notary's office, and a notice is to be published in certain journals, that the company will proceed to drain the section named, with a statement of the probable cost, and the time for the completion of the work.

After this publication, the company is to petition the court, and on proof of the publication, may obtain a decree that each portion of the property situated within the prescribed limits shall be subject to a mortgage in favor of the company," for such amount as may be assessed on it for its proportion of the whole cost.

As soon as the draining of a section is completed an account is to be made out of all the cost. Three appraisers are then to be appointed, who under oath are to designate the limits and assess to each individual property such portion of the amount of the account as will appear to them its due proportion.

They are to have a plan made, if the plan made before the assessment shall not be sufficiently detailed, and prepare a tableau setting forth the names of the proprietors, the extent of their property, and the amount with which it is charged.

The company is to give a prescribed notice of the day on which the tableau will be filed for confirmation—and any person whose interest may be affected thereby, " may file his opposition thereto, which shall be heard by the Court, with the right of appeal to the Supreme Court, and all lands taken for the use of the work to be paid for at the appraised value."

These are the two acts whose constitutionality was vindicated by the decision of the Supreme Court in the case

referred to in the present judgment. (Draining Company 11, A 370.)

The tableau was filed in this case by the administrators, subrogated by the Act of 1871, No. 30, p. 75 to the rights and powers of the several drainage districts. Their powers and duties are defined by the Acts of 18 March, 1858, No. 165, p. 114, and 17 March, 1859, No. 191, p. 152.

It is not necessary to cite particularly the provisions of these acts, as their essential principles are identical with those contained in the preceding legislation. They authorize the board to assess the cost of the work on the individual property holders affected by it, giving a lien upon the property and authorizing the court to render judgment therefor. But as in the other acts they carefully reserve the right to the owners to appear in court and contest the assessment.

In the petition presented by the administrators, they annex a copy of the assessment roll with the averment, that "the property assessed is set forth and described, together with the amount assessed, and the names of the owners thereof as far as known; and in case the owner or owners are unknown, said fact is stated. That said assessments have been open for the inspection of persons whose property was assessed for many months and said persons were notified duly by public advertisement, but they have neglected to pay the amount due by them respectively to the common fund of all as set forth on the assessment roll."

Your petitioners therefore pray the court to order that all persons whom it may concern, to show cause within 30 days why said assessment roll should not be approved

and homologated, " and that due publication of said order made." See pp. 6, 7.

In considering the objections urged to the constitutionality of these acts, we shall pass by as unworthy of comment the contention that they are to be held for naught as in conflict with the 4th section of the IV article, which provides for a guarantee to the States of a republican form of government—or as in conflict with the XIII Amendment abolishing slavery or involuntary servitude.

Coming then to the argument founded on the V Amendment, which declares that no person shall " be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

We need only say that this provision, as has been repeatedly decided, is a limitation on the power of the Federal Government and not a restraint upon the State Governments.

Barron vs. *Baltimore*, 7 Pet., 243.
Withers vs. *Buckley*, 20 How., 84.
Turtchel vs. *Commissioner*, 7 Wall., 321.

The only remaining objection to these acts now to be considered is that which is rested on the XIV Amendment—" Nor shall any *State* deprive any person of life, liberty or property without due process of law."

These are the identical words used in the V Amendment, now for the first time made operative on State legislation.

They are, however, to receive the same definition as

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have heretofore been placed upon them, and as we shall see they in no wise affect the reserved power of the States designated in the decisions as the "police power."

In the leading case of *Commissioner* vs. *Alger*, 7 Cush., 84, SHAW, C. J., says: "It is a well settled principle growing out of the nature of well ordered civil society that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property nor injurious to the rights of the community. All property, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the Government and held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable restraints and regulations established by law as the Legislature may think necessary and expedient.

This is very different from the right of eminent domain, the right to take private property for public use, which can be done only by providing compensation therefor. The power we allude to is rather the police power—the power vested in the Legislature to make all reasonable laws either with penalties or without, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same.

"This power," says another eminent Judge, "extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property in the State; * * * and persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the State."

Thorpe vs. *Rutland R. R.*, 27 Vermont, 149.

These definitions are approvingly cited by this court in the *Slaughter House case*, 16 Wall., 62, and are in full accord with the decision in *Gibbons* vs. *Ogden*, in which the Chief Justice, speaking of inspection laws, says, that "they form a portion of that immense mass of legislation, which controls everything in the State not surrendered to the General Government—all which can be most advantageously administered by the States themselves." *Health laws of every description*, are particularly stated as forming a portion of these powers "not granted to Congress, and consequently they remain subject to State legislation."

Mr. Justice FIELD, who dissented in the Slaughter House decision, says in the case of *Bartemyer* vs. *Iowa*, 18 Wall., 138, "no one has ever pretended that the XIV Amendment interferes, in any respect, with the police power of the State. The Judges who dissented in the Slaughter House case never contended for any such position. But, on the contrary, they recognized the power of the State in its fullest extent, observing that it embraced all regulations affecting the health, good order, morals, peace and safety of society; that all sorts of restrictions and burdens were imposed under it—and that these when, not in conflict with any constitutional prohibition, or fundamental principle, they could not be successfully assailed in a judicial tribunal."

"In many other cases (says Mr. COOLEY), besides the construction, improvement and repair of streets may special taxing districts be created with a view of local improvements. The cases of drains to relieve swamps, marshes and other low lands of their stagnant water, and of levees to prevent lands from being overflowed will at once suggest themselves. On the theory that the drainage is for the sole purpose of benefiting the lands of individuals it might be difficult to defend such legis-

lation. But if the stagnant water threatens disease, it may be a nuisance, which under its power of police, the State would have authority to abate. Con. Lim. (Marg.) p. 509.

And so says DILLON: "In the leading case on this subject, it was held upon great consideration, in an opinion, the reasoning and conclusion of which, have been almost everywhere admitted to be sound, that legislation of this character did not controvene the constitutional provision that 'no person shall be deprived of life liberty or property without due process of law.'" Dillon on Corp., § 598.

In the opinion of the District Judge, who, while setting aside the tableau, vindicated the constitutionality of the acts under which it was made after referring to the civil code, which declares that "servitudes arise either from the natural situation of the place, from the obligations imposed by law, or from contract between the respective owners." and that—

"Servitudes imposed by law, are established either for the public or common utility, or for the utility of individuals (655, C. 60), says—these laws impose on the proprietors respectively the expense of carrying into effect, and maintaining the servitudes.

The reason is, that the whole direct benefit accrues to the estates on and around which the work is done, the public obtaining only an indirect advantage, which the public and distant proprietors in turn reciprocate by their own works.

This, says he, became the law of the land from the moment Iberville and Bienville in 1700 raised their flag and built a fort on the banks of the Mississippi, taking formal possession of the territory in the name of the King of France; for the principle was in force and practically carried out by the laws of that country and of her colonies before Louisiana was discovered.

Hence, every title to land in this State, from the first to the last, has been acquired subject to the condition of submitting to, and performing the obligations resulting from these servitudes." Rec. p. 14.

It is very true that the assessment was made by appraisers appointed under the authority of the State, and this against the will of the proprietors. They do not aver, that as between the owners themselves, the assessment was not equitably apportioned, but rest their exception on the ground that they have been *deprived of their property, without due process of law*, contrary to the provision of the Fourteenth Amendment.

If we were to admit that that the compulsory payment of the assessment could be included within the meaning of the term "deprived of their property," how can it be said in face of the facts shown by the Record, that this has been done without "due process of law."

The parties were notified of the petition filed before the District Judge for homologating the tableau, they appeared, admitting the jurisdiction, and filed their exceptions, which challenged the constitutionality of the acts under which the petitioners acted, as well as the construction which had been placed upon them; they demanded no right which was refused; the proceedings were had in conformity with the law of the land. They succeeded before the District Judge upon their view of the construction of the acts. The petitioners appealed to the Supreme Court of the State—the proprietors were then heard in opposition to the appeal. The Supreme Court agreed with the District Judge in affirming the validity of the acts, but reversed his judgment setting aside the tableau. From this judgment of the highest judicial tribunal of the State the parties now take their writ of error, and bring the case here, where the Court will decide whether the claim made that the State stat-

utes are in conflict with the Federal Constitution is well founded.

After a full litigation in three tribunals, in which the plaintiff in error has enjoyed every advantage accorded to litigants, if she should then be compelled to pay the judgment, her complaint that this was without *due process of law*, could only be regarded as an absurdity.

The case then shows questions of constitutional law on which " the jurisdiction of this tribunal depends of so frivolous a nature as not to need future argument," and the judgment may be properly affirmed under the amendment to the 6th Rule.

P. PHILLIPS,
For Defendant in Error.

In the Supreme Court of the United States.

H. DAVIDSON
vs.
NEW ORLEANS ET AL. } No. 53.

ABSTRACT OF THE DRAINAGE LAWS.

[All the drainage laws referred to are printed in one piece, filed with the brief, except the principal sections of the act of 1871, which are printed in the brief.]

1. Originally three drainage districts were created, each extending from the Mississippi river to Lake Pontchartrain, and they were divided from each other by navigable canals—*i. e.*, the first district lay between the second and third, and was separated from the second by the New Orleans canal and from the third by the Carondelet canal, both which canals opened into Lake Pontchartrain, and reached thence nearly to the Mississippi.

Act of 1858, Secs. 1, 2, 3; Acts, p. 1.

This suit arises in the first district.

2. For each district a board of five commissioners was created and made a corporation, with power to dig canals, make embankments and establish and work pumps.

Act of 1858, Secs. 4, 5; Acts, p. 3.

3. Each board was to lay out a plan of its district, designating the subdivisions of the property, names of owners, locations of canals, and positions of engines. The cost of the work was also to be estimated. This plan was to be deposited with the Recorder of Mortgages, and after

notice given and objections heard the proper court should decree the property to be subject to a mortgage for such amount as should [afterwards] be assessed for its share of the cost of the work.

Act of 1858, Sec. 7; Acts, p. 6.

4. Each board might levy an assessment per square foot not exceeding $350,000, on non-payment whereof judgment might be recovered and the land sold, and the board might purchase it, and again sell it for not less than the amount of the judgment, costs and interest.

Act of 1858, Secs. 8, 9; Acts, p. 7.

5. By amendment to the above act in 1859, each board might issue bonds to amount of $350,000, to run not more than thirty years, and make an assessment to pay the principal and interest thereof, payable in not less than ten annual instalments.

Act of 1859, Secs. 1, 2, 3, 4.

6. After the completion of the works the several boards were to make annual estimates for maintaining the works and continuing the drainage, and report to the common council of New Orleans [for the first district,] who were required to levy an assessment per square foot for the expense thereof, to be paid to the respective Boards of Commissioners for disbursement.

Act of 1859, Sec. 5; Acts, p. 10.

But by amendment of section 5 in 1860 the several boards were required to estimate annually the amount requred to *construct*, keep up and maintain the works, the other provisions of section 5 remaining unchanged.

Act of 1860, Secs. 1, 2; Acts, p. 12.

In 1861 it was enacted that the assessment-roll [for each year] might be filed and notice given by publication, and after hearing objections, if any, the said rolls might be homologated and be a judgment against the property and against the owners.

Act of 1861, Sec. 1; Acts, p. 12.

OPERATION OF THE ACT OF 1871.

I. It transferred to one board all the powers and all the funds of the three boards. Sec. 9; Brief, p. 4. It took away from that board and gave to the Ship Canal Company the authority and right to excavate canals and build embankments. Sec. 2; Brief, p. 2.

All the assessments in the three districts were turned into a common fund and deposited to the credit of the Ship Canal Company. Sec. 9; Brief, p. 6.

Out of that fund were to be paid the bills of the Ship Canal Company for work done in any of the districts, at a fixed price. Sec. 8; Brief, p. 4.

The entire amount of the assessments was made demandable at once. Sec. 9; Brief, p. 5.

This assessment was not that made for the cost of the work, but was the amount required to pay the bonds, principal and interest.

Petition, Rec., p. 6, fol. 17; 7th Exception, Rec., p. 9, fol. 29.

NOTE.—The petition asks judgment for the last nine of the ten instalments authorized by the act of 1859, sec. 2, to be estimated and levied to pay the bonds, and interest. *It seems*, therefore, the first instalment had been settled.

Thus the amount exacted from the landowners is not the cost of the work, but the arbitrary sum of $350,000, with from one to thirty years (averaging five years) interest at 8 per cent. The scheme of the prior acts was to give the landowner from one to ten years credit after the execution of the work, charging him 8 per cent. interest; so that the assessment was for the work ($350) and for the credit (say $450). The act of 1871 makes the amount of principal and interest (the whole $800) payable at once, and in advance of the execution of the work; thus collecting say 120 per cent. more than the first acts intended to expend in the work.

II. The money collected in the first drainage district is made liable to be paid out for work done in the other districts. As the several districts are drained by pumps, and as both of the districts are separated from the first district by large navigable *canals, opening into the lake*—as is shown by the plat referred to in the record—it is certain and matter of record, that pumping water out of district No. 2 cannot possibly benefit district No. 1. The water cannot run from district No. 1, *across the navigable canal*, into district No. 2 or No. 3, to be thence pumped.

III. There is no provision in the act that district No. 1, shall be drained, or that a single cent of the money exacted in that district shall be expended for the benefit of the property therein. The canal company is authorized and empowered to dig the canals designated in the act, or to be designated by the board; but the company is not required to dig a yard of canal, or make a yard of levee. The Board of Administrators are, indeed, required to locate canals and embankments. But when? Only "in time to prevent delay in the prosecution of the work on the part of the said company;" and if they fail in this duty, they are liable to the company only, and the measure of damages is the loss of the company.

If the assessment were measured by the sum necessary to complete the work, it might be said that by the expenditure of the money, the work would necessarily be completed; but the assessment does not represent the cost of the work; it is an arbitrary sum of $350,000 with 120 per cent. added.

IV. Large tracts of land have been sold for the assessments and bought by the board. (Stipulation, Art. 5, rec., p., 26.) This property, if not required to pay for work done by the canal company, is to be held "for the benefit of New Orleans." (Act of 1871, sec. 9, Brief, 6.)

Thus if these "large tracts of land" be not required to be sold again, that is, if the cash collection pay for the

work, the whole expense of the drainage will fall on the cash payer, and the assessments of the delinquents go to the city for general purposes.

V. The subsequent legislation of 1877 can properly be referred to to illustrate the damages to which the acts complained of rendered the landowners liable.

The wrong of the legislation complained of is in exacting the money of the landowners and not giving any consideraion, or the assurance of any consideration, in return for the payment.

Whether the landowners would get anything was made to depend on the pleasure of the canal company, the Board of Administrators, and the legislature. The possibility that all these bodies or any of them might give the landowners some benefit for their money, we say, was no consideration for the payment exacted.

It could be foreseen that after the payment of the money, or judgment rendered therefor, the legislature *might* withdraw from the board and from the company, the power to drain the land, leaving the money in the hands of the board or the judgment in force. That this has actually been done, does not *constitute* the argument against the law, but it strengthens it materially.

JOHN D. McPHERSON,
JAS. D. HILL,
For Plainliff in Error.

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Railway Railway or
Statutes, or an authority
upon question under Insurance
Statutes and Decisions is
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Pen State 132
13 N.Y. 428
1 Wend 92 Penn 85
or 93 Pub Docum
3 Cal -